SUPREME COURT, U. S.

No. 945

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

LAWRENCE P. HICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG, and THOMAS R. BENZ,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, an Illinois corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Lawrence P. Hickey, George D. Sullivan, Jr., Burton H. Young and Thomas R. Benz, petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this cause on September 23, 1966, rehearing denied on October 27, 1966.

In the case below the State of Illinois and the City of Chicago intervened as additional party plaintiffs in support of petitioners' position (Statement, p. 11, *infra*). Petitioners are taxpayers whose right to sue has been recognized by the Supreme Court of Illinois in the two appeals to that court from the trial court in the instant case.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois for which review is sought (R. 5-23) is reported in —— Ill.2d ——; 220 N.E.2d 415, and is printed in the Appendix hereto, pp. 3-27.

The opinion of the trial court (R. 4, Pages 537-542), granting Respondent's motion to dismiss the amended complaint, is not reported. This opinion is printed in the Appendix hereto, pp. 31-35.

JURISDICTION

The judgment of the Supreme Court of Illinois sought to be reviewed, affirming on direct appeal the trial court's decree, was dated and entered on September 23, 1966 (R. 24) and is printed in the Appendix hereto, pp. 29-30. A timely petition for rehearing filed on October 7, 1966 (R. 25, 26, 27, 28) was denied on October 27, 1966 (R. 29; App. 28). The trial court's decree dismissing the amended complaint was dated and entered on October 28, 1965 (R. 4, pp. 542-543) and is printed in the Appendix hereto, pp. 36-37.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). The federal questions sought to be reviewed were timely and properly raised in the complaint filed in the trial court and in a brief submitted to the Supreme Court of Illinois as detailed in the Statement, p. 6, at 10, 13 *infra*.

QUESTIONS PRESENTED

The State of Illinois and the Illinois Central Railroad were parties to a suit, 146 US 387, 184 US 77, in which an 1888 federal decree, predicated upon federal questions, adjudicated that certain lands, originally consisting of submerged lands in Lake Michigan granted to the State pursuant to Congressional Acts when the State was incorporated, were owned by the State in trust for the People of the State. The air rights alone over these lands are now worth hundreds of millions of dollars, are along Chicago's lake front and are of crucial public importance.

In twice affirming the decree, this Court adjudicated that the trust impressed upon the title of the State to these lands was of a special character which prevented the State from being divested of such title except for public purposes in the best interests of all the People. Even the Illinois Legislature, according to this Court's holding, could not disavow this trust by giving the title to these lands to the railroad solely for its private gain and purposes. (The same trust was held by this Court to attach to the submerged lands of the Great Lakes owned by all of the states bordering these lakes.)

Petitioners here seek to enforce said federal decree against the railroad as *res judicata* and to prevent the railroad from usurping the title to these lands and air rights. By its judgment below, the Illinois Supreme Court has now given the railroad title to these lands and air rights on the sole ground that the State was barred by laches and estoppel from asserting its title under the 1888 federal decree. The Court held that local public agencies and officials, by their conduct in disavowing the State's title, caused the State to lose its title to these lands and air rights. (These agencies and officials had no authority from the State to dispose of State property; on the contrary, their duties required them to protect the State's title.) The questions presented are:

1. Did the Illinois Supreme Court violate the jurisdiction and judicial power vested in this Court by Sections 1 and 2 of Article III and the Supremacy Clause (Article VI) of the Constitution of the United States:

a. by failing to give effect to the 1888 federal decree as *res judicata*, the State and the railroad having been parties to both the instant case and the earlier case in which the 1888 decree was entered and the lands encompassed by said decree having been involved in the instant case?

b. by giving title to these lands to the railroad and thereby nullifying the 1888 federal decree which had adjudicated that said federal trust attached to the State's title to these lands and prevented the lands from being given away to private interests except for a public purpose?

c. by avoiding the significance of the 1888 federal decree and formulating as a matter of state law a doctrine of estoppel and laches, plainly untenable (as the railroad was a party to the 1888 decree), instead of deciding the merits of this case? Can the Illinois Supreme Court thus become the final arbiter of said federal decree?

2. Can any branch of any state government, bordering on the Great Lakes, by a state court decree, state statute or conduct of administrative state officials give the title to the submerged lands of the State in these lakes to private interests for non-public purposes without violating the federal trust adjudicated by this Court regarding such lands?

3. Did the court below, by failing to recognize and give full effect to said 1888 federal decree, deprive the People of the State of Illinois and the petitioners, the beneficiaries of said trust, of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article VI:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

United States Constitution, Article III, Sections 1 and 2:

> "Section 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . "
>
> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . "

United States Constitution, XIVth Amendment:

> " . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3 Stat. at Large 428 (April 18, 1818), Chap. LXVII.—"An Act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states." This statute is printed in Appendix hereto, pp. App. 1-2.

3 Stat. at Large 536 (December 3, 1818), "RESOLUTION declaring the admission of the state of Illinois into the Union." This statute is printed in Appendix hereto, p. App. 2.

STATEMENT

As the court below observes, the factual background of this case is highly complex (App. p. 6). It involves six years of litigation in the Illinois courts, previous litigation before this Court and in the State courts and events going back to 1851.

This case is an outgrowth of the decisions of this Court in *Illinois Central Railroad Co.* v. *Illinois*, 146 U.S. 387, and *Illinois ex rel. Hunt* v. *Illinois Central Railroad Co.*, 184 U.S. 77, twice affirming on appeal a decree entered in 1888 by the then Circuit Court of the United States for the Northern District of Illinois, 33 F. 730, and the United States Circuit Court of Appeals (7th Cir.), 91 F. 955.

These earlier federal opinions, known as the "Lake Front Cases", involved the State of Illinois, the City of Chicago and the Illinois Central Railroad Co., all parties to the instant case. A crucial portion of the same land is involved in the instant case — the lakefront lands in the City of Chicago between the Chicago River and 16th Street (146 U.S. 387, 433), an area almost the size of, and immediately adjacent to, downtown Chicago. The balance of the lands involved in the instant case stretch approximately four and one-half miles along the lakefront south of 16th Street. (See maps at R. 3, pages 243, 249; and R. 4, pages 366 and 367, Exhibit S-1).

Today, the air rights appurtenant to these lands alone are worth hundreds of millions of dollars.

The instant case was filed against the respondent, Illinois Central Railroad Co., in 1960 in the Circuit Court of Cook County, Illinois by petitioners, suing on behalf of the State of Illinois and the City of Chicago, in petitioners' various capacities as taxpayers, citizens and voters of the State of Illinois and the City of Chicago, as citizens of the United States, and also pursuant to certain Illinois Acts which gave them the statutory right to sue on behalf of the State and the City (R. 3, pages 179-182).*

The State of Illinois and the City of Chicago were additional parties plaintiff in the Court below in support of petitioners' position, as hereinafter noted. The matter was decided on the pleadings and the relevant portions thereof are summarized here. Petitioners' amended complaint (R. 3, pages 179-270) alleges that:

ALLEGATIONS OF PETITIONERS' COMPLAINT

All of the lands in question were created by the railroad filling in from the natural shoreline of 1852 the submerged waters of Lake Michigan in progressive stages beginning in 1852 until sometime after 1930 (R. 3, pages 183-186).

A portion of the lands were so reclaimed pursuant to the authority granted the railroad in the 1851 charter it received from the State Legislature to *use* the waters of

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* In 1959 the same plaintiffs suing as state and federal taxpayers filed a suit against the Illinois Central Railroad Co. in the federal courts seeking to recover on behalf of the State of Illinois and the City of Chicago a portion of the lands and air rights involved in the instant case, *Hickey, et al.* v. *Illinois Central Railroad Co.*, (7th Cir. 1960), 278 F.2d 529, cert. den., 364 U.S. 918. The latter case, however, did not involve the same legal issues, and particularly did not involve the federal constitutional questions, presented in the instant case. Pursuant to the decision of the United States Court of Appeals in that case that it was a matter for the state courts to decide whether petitioners could sue as state taxpayers, petitioners filed the instant case in the state courts.

Lake Michigan for railroad purposes. The Charter required the railroad to obtain the consent of the City, which was obtained by various ordinances (R. 3, page 188). But neither the Charter from the State nor the ordinances purported to convey title to the railroad (R. 3, page 195).

A portion of the lands were created by filling pier structures, and slips between these structures, the railroad had built into the lake. This was in violation of this Court's permanent injunction issued in the Lake Front Cases enjoining the railroad from further filling in the slips and the waters of Lake Michigan, 184 U.S. 77, 87 (R. 3, page 185). (The Court below appears to acknowledge this violation (App. p. 11).)

Upon its admission to the Union in 1818, Congress granted to the State of Illinois in trust for the People the title to all of the submerged lands between the State's natural shoreline and the middle of the lake, 3 Stat. at Large 428 (April 18, 1818) App. 1-2; 3 Stat. at Large 536 (December 3, 1818) App. 2; (R. 3, page 187). The lands in question were filled in subsequent to 1818 and, by operation of law, such reclaimed submerged lands were impressed with the same trust in the public interest and the State forthwith became the owner thereof (R. 3, page 187).

The State has since always held and does now hold the title and ownership of these reclaimed lands in trust for the People of the State subject to such title thereto or other rights therein as may have been granted by the State to the City of Chicago and subject further to the railroad's easement for railroad purposes only (R. 3, page 187).

The complaint further alleges that in the Lake Front Cases, 146 U.S. 387; 184 U.S. 77, this Court adjudicated that the reclaimed and submerged lands encompassed by the 1888 decree, comprising a major portion of the lands involved in the instant case, were owned in fee by the State of Illinois in trust for the People of the State for public purposes; that the railroad had only an easement for railroad purposes in these lands, and by reclaiming them from the submerged waters of Lake Michigan never acquired any title thereto nor the right to dispose of same to others by way of deed or otherwise; that said decree gave the railroad title to certain pier structures the railroad had built out into the lake but not to the state owned bed of the lake underneath the piers; that said decree perpetually enjoined the railroad from filling in the slips between the piers or any more of Lake Michigan; that since the Lake Front Cases the railroad removed the piers and filled in the waters in the area formerly occupied by said structures, and also the water in the former slips, presently constituting vast areas of reclaimed land between the Chicago River and 16th Street, all in violation of said perpetual federal injunction.

Further, it is now wrongfully asserting the ownership and dominion over these immensely valuable lands and air rights appurtenant thereto for its private gain and in denial of the public's rightful title thereto; that the violation of said permanent injunction constituted a violation of a federal right which should be protected by the state courts (R. 3, pages 191-192).

ALLEGATIONS OF PETITIONERS' COMPLAINT RAISING FEDERAL QUESTIONS

The complaint emphasized that the Lake Front Cases were *res judicata* on the fact that the State owned the title in fee to all of the lands encompassed in the decree in trust for the People, subject to an easement in favor

of the railroad for railroad purposes only; that in the event the state court should fail to recognize and give full force and effect to said federal court adjudications by declaring and decreeing that the railroad had no title to these reclaimed lands, such failure would constitute an abrogation of the judicial power of the United States in violation of Sections 1 and 2 of Article III of the Constitution of the United States and would also deprive the people and citizens, and the plaintiffs in their various representative capacities, of rights, privileges and immunities arising under the Fourteenth Amendment to the Constitution of the United States (R. 3, pages 193-195, 222, 232-234).

The complaint also alleges that the railroad claims title to these lands under the 1930 and 1912-1913 decrees entered by Illinois trial courts in non-adversary boundary line proceedings referred to in the opinion of the court below (App. pp. 14, 8, 11); that these decrees were void because these proceedings were purely statutory in nature and the statute expressly applied to, and became legally operative only with respect to true owners of shorelands (and riparian rights appurtenant thereto), which the railroad was not, because the Lake Front Cases had adjudicated that the State owned the shorelands and riparian rights involved in these State proceedings (R. 3, pages 196-217). Further, that said state court decrees and the statute upon which they were based, as so construed by said decrees, were in violation of the Fourteenth Amendment to the Constitution of the United States as the effect of said decrees was to make a wrongful gift or donation to a private corporation of these lands so adjudicated by the federal courts to be publicly owned, and as such constituted action by the State Government which deprived the People of the State, and the petitioners in their various representative capacities, of property without due process of law (R. 3, page 232).

The complaint sought a declaration by the state court that the lands and air rights in question belong to the State and that the railroads be required to turn over to the State all proceeds from all sales which it had made of portions of these lands and air rights and that the railroad be enjoined from making any other dispositions of this property (R. 3, pages 233-236).

In 1962 the City of Chicago intervened and adopted the amended complaint of petitioners (R. 3, pages 290-295). Subsequently, the Attorney General of the State of Illinois intervened and filed in the trial court an intervening complaint expressly aligning the State of Illinois with, and in support of the position of, the petitioners and the City of Chicago. The Attorney General's complaint in substance adopted petitioner's complaint, except for the said federal constitutional questions (R. 4, pages 334-367).

THE PLEADINGS OF RESPONDENT

The railroad filed a motion to dismiss the petitioners' and City's complaint (R. 3, pages 2-6, 178, 271-275) and an answer to the State's intervening complaint (R. 4, pages 368-518). The State filed a reply (R. 4, pages 518-528). Thereupon, the railroad filed a motion for judgment on the pleadings as against the State (R. 4, pages 532-535) and the trial court heard the motions simultaneously, as the complaints presented common legal issues (R. 4, pages 535-536).

The railroad's aforesaid pleadings directed against all the complaints asserted that the railroad owned these lands by reason of the Lake Front Decisions, 146 U.S. 387, 184 U.S. 77, which the railroad conceded to be *res judicata* on the parties, the boundary line decrees of 1930 and 1912-1913, and because of laches and estoppel arising out of the conduct of State and City officials. The rail-

road's pleadings denied any violation of this Court's permanent injunction because the filling in of the slips was done with the consent of the Department of Public Works of the State of Illinois, the City of Chicago and the Corps of Engineers (R. 3, page 9; R. 4, pages 389, 396, 397, 419).

The trial court's decree in the case below granted both motions and adjudicated that "defendant Illinois Central Railroad Company is the owner in fee simple of all the lands claimed in this cause by the State of Illinois and the City of Chicago, or on their behalf, between the Chicago River and the north line of Randolph Street and south of 11th Place, or Park Row, in the City of Chicago, Cook County, Illinois" (R. 4, page 542). The trial court interpreted the 1888 federal decree entered in the Lake Front cases as vesting title in fee simple in the railroad (R. 4, pages 537-542) to all of that portion of the lands involved in the instant case encompassed by said decree.

The railroad has conceded that the Lake Front Cases adjudicated that the City owned that portion of the original lands in question between Randolph Street and 11th Place, commonly known as Grant Park, subject to the railroad's easement for railroad purposes only. Accordingly, the said trial court decree did not include that portion of the City owned lands (R. 4, pages 542-543). This, of course, was in accord with petitioners' allegations. As a result, the only lands involved on the subsequent appeal to the Illinois Supreme Court were those claimed on behalf of the State.

The trial court did not rule on the question of laches and estoppel raised by the railroad and its opinion makes no reference thereto (R. 4, pages 537-542).

The attempts of the taxpayers to have discovery to disprove the existence of innocent purchasers of value from

the railroad of the air rights herein involved were prohibited by the trial court (R. 3, pages 279-289, R. 4, pages 528-536).

On appeal to the Supreme Court of Illinois by petitioners, the State of Illinois and the City of Chicago, acting jointly, that court affirmed the trial court's decree solely on the ground of estoppel and laches. It carefully noted that it was not passing upon the issue as to whether the Lake Front Cases gave title to these lands to the State or the railroad (App. p. 23).

Instead, it held that the disavowal of the State's title by various State and City agencies and officials (who had no authority to dispose of the State's title) barred the State from asserting the title it claimed under the Lake Front Cases, 146 U.S. 387, 184 U.S. 77. In so doing, the court failed to pass upon the federal constitutional questions raised in petitioners' complaint hereinbefore mentioned, and in petitioners' brief filed with the Supreme Court of Illinois attacking the trial court's decree (Supplemental Record, pages 2-4).

REASONS FOR GRANTING THE WRIT

The judgment of the court below squarely presents to this Court substantial federal questions involving a federal-state conflict of national importance with reference to the submerged lands of the Great Lakes. The answers to these questions will decide whether the State of Illinois or the Illinois Central Railroad owns the miles of lands and air rights involved in the instant case worth hundreds of millions of dollars and of crucial public importance.

I.

The decision of the Illinois Supreme Court is in conflict with the decisions of this Court in *Illinois Central Railroad Co.* v. *People of the State of Illinois and the City of Chicago,* 146 U.S. 387, and *Illinois ex rel. Hunt* v. *Illinois Central R. Co.,* 184 U.S. 77, twice affirming on appeal the decree entered in 1888 by the then Circuit Court of the United States for the Northern District of Illinois, 33 F. 730 (1888) and the United States Circuit Court of Appeals (7th Cir., 1899), 91 F. 955. These federal opinions, known as the "Lake Front Cases", involved the identical parties and a crucial portion of the land as in the instant case, and are *res judicata* in favor of the State and the People as to the issues herein.

The case at bar is in the nature of a bill in equity in aid of the federal decree entered in the Lake Front Cases in 1888. It is an appropriate method of securing on behalf of the State of Illinois and the People the benefits of the Lake Front decree when subsequent events have made necessary some further relief in order that the State and the People may enjoy the full fruits of their victory in the Lake Front Cases. *Independent Coal & Coke Co.* v. *United States,* 274 U.S. 640.

The Lake Front Cases held the reclaimed and submerged lands of Lake Michigan encompassed by the decree therein, now of immense value and of vast public importance, were owned in fee by the State in trust for the People of Illinois "for purposes in which the whole People are interested . . . for public use". 146 U.S. 452, 456 and 457.* This Court further held that even the Illinois Legislature could not nullify this trust. Title to these lands could not be given to the Ilinois Central Railroad for its private gain, for a non-public purpose. 146 U.S. 452-460.

Yet, now, sixty-four years later, the Illinois Supreme Court, ignoring *res judicata*, nullifies the 1888 decree of the United States Circuit Court, twice affirmed by this Court in the Lake Front Cases.

The principal issue before the Court below involved a construction of this 1888 decree as to whether it vested title to these lands in the State in trust for the People, as the petitioners contend, or whether said decree vested title in the railroad, as the latter contends. The state court sidestepped this issue. It ignored the holdings of the Lake Front decisions. It innovated a doctrine of estoppel and laches in an attempt to avoid the impact of the Lake Front decree. The State now is precluded from asserting title to these lands because some public officials, who had no authority to dispose of title and rights to the lands, failed to protect the public trust from usurpation by the railroad.

Never before has the State of Illinois been stripped of any lands by this estoppel and laches formula, let alone

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* The only interest the railroad obtained by the 1888 decree was a railroad easement and title to certain piers and other structures, but not the State's title to the bed of the lake upon which they were constructed. 184 U.S. at 85.

reclaimed and submerged lands subject to the federally endowed trust.

NATURE OF THE TRUST

The Lake Front Cases adjudicated that this trust is of a unique character:

> "But it is a title *different* in character from that which the State holds in lands intended for sale . . . It is a title held in trust for the People of the State . . . The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, *cannot be relinquished by a transfer of property.* The control of the State for the purposes of the trust *can never be lost,* except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining . . . The State *can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties,* except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, *than it can abdicate its police powers in the administration of government and the preservation of the peace* . . . The trust with which they are held, therefore, is *governmental and cannot be alienated,* except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining." 146 U.S. at 452, 453, 455, and 456. (Emphasis added.)

The Lake Front decisions were a final determination, and *res judicata,* of the character of the trust impressed upon the State's title to the reclaimed and submerged lands.

This title is incapable of being destroyed through estoppel or laches in the same manner as this Court held in *United States* v. *California,* 332 U.S. 19. There it was decided that the United States could not be estopped from asserting its title to its tide lands where federal agencies and officials, over a period of many years, had disavowed the ownership of these lands.

> "As a matter of fact, the record plainly demonstrates that until the California oil issue began to be pressed in the thirties, neither the states nor the Government had reason to focus attention on the question of which of them owned or had paramount rights in or power over the three-mile belt. And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for the private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." 332 U.S. 19, at 40.

Likewise, in the instant case, none of the public agencies or officials had any authority to dispose of State property. Nor were the air rights herein (now worth hundreds of millions of dollars, App. p. 5) of significance until just prior to the filing of petitioners' complaint.

Because the Lake Front decisions were *res judicata* on the title to the lands owned by the State and upon the nature of the trust impressed upon such title, the court below lacked the jurisdiction and power to formulate a doc-

trine of estoppel and laches under State law which for all practical purposes nullified the title the State received under the decree of 1888 in the Lake Front Cases. By attempting to do so, the Court below usurped the judicial powers vested in this Court by Sections 1 and 2, Article III, and the Supremacy Clause (Article VI) of the United States Constitution.

This trust, of federal origin, impressed upon all the submerged lands off its shores to the middle of Lake Michigan was granted to the State of Illinois by Congressional Acts creating the boundaries of the State and granting the federal lands within such boundaries to the State. (146 U.S. 434, 435; 3 Stat. At Large 428, 536, App. pp. 1-2)

The trust doctrine is founded upon the necessity of preserving to all the People the use of navigable waters, and the submerged lands under the Lake owned by the State are subject always to the paramount right of Congress to control navigation in furtherance of the Congressional power to regulate interstate and foreign commerce. 146 U.S. 435, 436 and 437. Cf. *Sanitary District of Chicago* v. *United States,* 266 U.S. 405, 425, wherein this Court held that the United States may have an "ultimate sovereign interest" in Lake Michigan.

It was solely on the basis of this trust, *and the inability of the State Legislature to disavow said trust,* that this court held the constitutional rights of the Illinois Central Railroad were not violated by an Illinois Act repealing an earlier Act which attempted to grant to the railroad title to the submerged lands involved in the Lake Front Cases for a non-public purpose. 146 U.S. at 460.

The Lake Front Cases therefore plainly involved a construction of the Federal Constitution and the nature of the trust impressed upon the title the State received under

the Congressional Acts. Thus, the petitioners in the instant case are seeking the vindication of federal rights adjudicated by a federal decree in favor of the State.

Petitioners having properly and timely asserted in the State courts below the Lake Front Cases, and the federal decree of 1888 entered therein, as *res judicata,* and the Supreme Court of Illinois having refused to give said federal decisions and decree such effect, a federal question reviewable in this Court under 28 U.S.C. Section 1257 (3), exists. *Stoll* v. *Gottlieb,* 305 U.S. 165, 167; *Dupasseur* v. *Rocherau,* 21 Wall. 130, 134.

Moreover, "whether a federal judgment has been given due force and effect in the state court is a federal question reviewable by this court which will determine for itself whether such judgment has been given due weight or otherwise." *Deposit Bank* v. *Frankfort,* 191 U.S. 499, 515.

The interpretation of the decree entered in the Lake Front Cases concerning the title and the nature of the federal trust, and the methods by which the title can be shorn of such trust, are matters ultimately within the judicial powers of this Court.

On the second appeal in the Lake Front Cases, 184 U.S. 77, this Court refused to reopen the decree affirmed on the first appeal, 146 U.S. 387, for the purpose of litigating an issue decided on the first appeal. This Court on the second appeal held:

> "Every matter embraced by the original decree of the Circuit Court, and not left open by the decree of this court, was conclusively determined, as between the parties, by our former decree, and is not subject to reexamination on this appeal." 184 U.S. at 93.

When this Court so refused to reopen its own decree, it is evident that the Supreme Court of Illinois cannot now

do so by voiding said decree indirectly through estoppel and laches.

Having adjudicated the title of the State to these lands under the federal decree in the Lake Front Cases, there can be no doubt whatsoever since *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 4 L. Ed. 97 (1816), that this Court may take whatever action it deems necessary to construe, protect and enforce the title vested by said decree against nullification by a State court. State recalcitrance can be met by entry of judgment in this case as in *Martin* v. *Hunter's Lessee.* Cf. *McCulloch* v. *Maryland,* 4 Wheat. 316, 4 L. Ed. 579 (1819); *Gibbons* v. *Ogden,* 9 Wheat. 1, 6 L. Ed. 23 (1824).

LACHES AND ESTOPPEL ARE PLAINLY UNTENABLE

The court below, in discussing what it states to be the vital question on the estoppel and laches, App. p. 23, cites *Dill* v. *Widman,* 413 Ill. 448:

> "The party claiming the estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts."

There can be no quarrel with this proposition of Illinois law, but it is inapplicable here, for the simple reason that the railroad was a *party* to the Lake Front Cases and, of course, had the "knowledge" as well as "the convenient means of knowing the true facts".

The court below casually nods to the principle of *United States* v. *California,* 332 U.S. 19, but claims "in the context of the extra-ordinary circumstances here prevailing . . . the basic concept of right and justice preclude the State from now asserting any claims to the lands involved". 220 N.E.2d at 426, 427.

The railroad having been a party to the Lake Front Cases, "the basic concept of right and justice" should preclude the railroad from avoiding the *res judicata* effects of the Lake Front decree through any estoppel and laches.

Furthermore, it is difficult to understand how "the basic concept of right and justice" favors the railroad when it filled in a substantial portion of the lands in question after the Lake Front Cases in violation of the injunction issued in those cases perpetually enjoining the railroad from further filling in the lake, 184 U.S. 77, 87.

Moreover, this Court's holding in *United States* v. *California*, 332 U.S. 19, 40, is pertinent for another reason:

> "We have not overlooked California's argument, buttressed by earnest briefs on behalf of other states, that improvements have been made along and near the shores at great expense to public and private agencies. And we note the Government's suggestion that the aggregate value of all these improvements are small in comparison with the tremendous value of the entire three mile belt here in controversy. But however this may be, we are faced with the issue as to whether state or nation has paramount rights in and power over this ocean belt, and that great national question is not dependent upon what expenses may have been incurred upon mistaken assumptions."

In addition, in the instant case the relief sought against the railroad is a declaration that the State owns the lands and air rights in question and that the railroad be required to pay the State such proceeds as the railroad received from purported sales of the air rights to third parties who have been innocent purchasers for value. The fact that the latter may exist (which has not been deter-

mined to date)* would create no estoppel or laches in favor of the railroad. Cf. *Independent Coal & Coke Co.* v. *United States,* 274 U.S. 640.

For the foregoing reasons, on the face of the opinion of the court below, and without resorting to the detailed denials of the railroad's pleadings concerning laches and estoppel, the holding of that court with respect to the latter is plainly untenable. This Court cannot be deprived of its jurisdiction and power to review a state court judgment interposing a non-federal ground of decision which is plainly untenable. *Ward* v. *Love County,* 253 U.S. 17, 22 and 23.

II.

The extent to which the legislative, judicial and executive branches of the states bordering on the Great Lakes have the power to divest their respective states of titles to submerged lands of the lakes held under the federal trust established by this Court in the Lake Front Cases, 146 U.S. 387, 184 U.S. 77, is a substantial federal question inherent in this case not heretofore determined by this Court.

The Lake Front Cases held that this federal trust applied to all of the Great Lakes, 146 U.S. at 435, 436 and 437, and it prevented any Great Lake State from being divested of its title to submerged lands in these lakes except for a public purpose in the best interests of all the People, 146 U.S. at 452 and 453.

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* Petitioners were denied their requested discovery aimed at ascertaining whether any innocent purchasers for value existed (R. 3, pages 279-289; R. 4, pages 528-536). The trial court did not pass on laches or estoppel. (See Appendix 31).

Notwithstanding the federal trust imposed upon the titles under which the various states hold their submerged lands in the Great Lakes, the states have assumed that their state laws completely govern the disposition of these lands. As a result there are no uniform safeguards applicable to such dispositions, each state exercising its independent judgment. The Supreme Court of the State of Michigan, for example, *State* v. *Venus of America Land Co.*, 160 Mich. 680, 125 N.W. 770, has held, directly contrary to the Supreme Court of the State of Illinois in the case below, that estoppel and laches will not apply with respect to the submerged lands in the Great Lakes owned by the State of Michigan.

While state law might apply for purposes of deciding riparian rights and similar issues, it should always be subject to the federal trust prohibitions against disposing of these lands to private interests contrary to the public good.

The judgment of the court below emphasizes the urgent need for this Court to emphatically reaffirm the federal trust in the submerged lands of the Great Lakes to prevent further unlawful encroachments on these lands by public officials and state legislatures. In no other way can the submerged lands be protected from further violations of the federal trust, the local laws of the various states being inconsistent and inadequate for that purpose.

In the instant case, any portion of the lands not encompassed by the 1888 decree in the Lake Front Cases are still protected from usurpation by the railroad under the doctrine of the federal trust of submerged lands in the Great Lakes. The disavowal of such trust by public agencies and officials cannot be a legitimate basis for the estoppel and laches upon which the court below based its decision.

The trust, a federal right asserted in the court below, was disregarded. This Court then has the jurisdiction and power to remedy this situation. As this Court held in *Ancient Egyptian Arabic Order N.M.S.* v. *Michaux*, 279 U.S. 732, at pages 744, 745:

> "The right thus specially set up in the state court is a federal right. Whether it was denied or not given due recognition by the challenged decree, as affirmed, is a question on which the defeated claimants are entitled to invoke the judgment of this court, as is done in their petition for certiorari. And it is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a nonfederal ground of decision having no fair support."

By failing to give effect to the federal trust, and the federal decree upheld by this Court in the Lake Front Cases, 146 U.S. 387, 184 U.S. 77, the judgment of the court below deprived the petitioners and the People of Illinois, the beneficiaries of said trust, of these lands without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The judgment of the court below exemplifies the danger of having the submerged lands of the Great Lakes, important natural resources, depleted at the expense of the People in violation of said federal trust.

For the reasons stated in this petition, this Court has the ultimate power to interpret the federal decree in the Lake Front Cases, 146 U.S. 387, 184 U.S. 77, for the purpose of deciding whether the enormously valuable lands in question are owned by the State or by the railroad, and, thus, whether they are to be developed in the best interests of the People under public guidance or at the whim of the railroad for its private gain. Whatever this Court decides in this respect, at least there will have been a

decision on the merits of this case. It would be incredible, and in frustration of the public interest, for the railroad to be deemed the owner of these lands without the necessity of its proving title thereto.

THE INTEREST OF THE UNITED STATES

The United States also has a substantial interest in the outcome of this case, in addition to the compelling virtue of seeing that its decrees are respected.

Petitioners' complaint alleges that the City requires the air rights over the railroad's tracks at 25th Street, a portion of the air rights involved in this suit, for the construction of an overpass connecting important arterial highways in the City. This overpass will not interfere with the railroad's use of its tracks. The railroad has demanded from the City $2,500,000.00 for these air rights, in spite of the decision of this Court in the Lake Front Cases, 146 U.S. 387, 184 U.S. 77 (R. 3, Page 228).

This overpass recently was built. If the judgment of the court below stands, the City will have to pay the railroad for these air rights. This Court may take judicial notice of the fact that under various federal aid programs to municipalities and states a principal portion of the $2,500,000.00 will be paid by federal matching funds.

That this one example will not be an isolated case is evident from the fact that the lands and air rights in question comprise miles of valuable lakefront lands. Unquestionably, in the future a multitude of recreational, cultural and other public projects will be built on portions of these lands and air rights. In each case it will be necessary for the public authorities to condemn them for the projects, and federal aid will be used. Over a period of time such federal financial assistance could amount to many millions of dollars.

CONCLUSION.

This Petition for a Writ of Certiorari is the last chance available to assert the title the State obtained under the Lake Front Cases, 146 U.S. 387, 184 U.S. 77, to these most important lands and air rights. The decision below, unless reversed by this Court, will be equivalent to a perpetual denial of such title because the petitioners, taxpayers, the State of Illinois and the City of Chicago were all parties. The state court decision, if it stands, will be binding forever upon everybody who could conceivably contest the railroad's usurpation of these lands and air rights owned by the State in trust for the People.

For the reasons mentioned herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEONARD R. HARTENFELD
Counsel for the Petitioners

Of Counsel:
GEORGE F. ARCHER

CONCLUSION.

This Petition for a Writ of Certiorari is the last chance available to assert the title the Right pointed under the Lake Front Cases, 146 U.S. 387, 154 U.S. 77, to these most important lands and air rights. The decision below, unless reversed by this Court, will be equivalent to a perpetual denial of such title because the petitioners, taxpayers, the State of Illinois and the City of Chicago were all parties. The state court decision, as it stands, will be binding forever upon everybody who could conceivably contest the railroad's usurpation of these lands and air rights owned by the State in trust for the People.

For the reasons mentioned herein, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LEONARD F. FLEMMER
Special Counsel for the Petitioners
Of Counsel:
GEORGE F. ACKMAN

APPENDIX

APPENDIX A

EXTRACT FROM 3 STAT. AT LARGE 428 (APRIL 18, 1818)

CHAP. LXVII.—An Act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of the territory of Illinois be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever.

SEC. 2. *And be it further enacted,* That the said state shall consist of all the territory included within the following boundaries, to wit: Beginning at the mouth of the Wabash river; thence, up the same, and with the line of Indiana, to the north-west corner of said state; thence, east with the line of the same state, to the middle of Lake Michigan; thence, north along the middle of said lake, to north latitude forty-two degrees thirty minutes; thence, west to the middle of the Mississippi river; and thence, down along the middle of that river, to its confluence with the Ohio river; and thence, up the latter river, along its north-western shore, to the beginning: *Provided,* that the convention hereinafter provided for, when formed, shall ratify the boundaries aforesaid; otherwise they shall be and remain as now prescribed by the ordinance for the government of the territory north-west of the river Ohio:

Provided also, That the said state shall have concurrent jurisdiction with the state of Indiana on the Wabash river, so far as said river shall form a common boundary to both, and also concurrent jurisdiction on the Mississippi river, with any state or states to be formed west thereof, so far as said river shall form a common boundary to both.

3 STAT. AT LARGE 536 (DECEMBER 3, 1818)

1. RESOLUTION *declaring the admission of the state of Illinois into the Union.*

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That, whereas, in pursuance of an act of Congress, passed on the eighteenth day of April, one thousand eight hundred and eighteen, entitled "An act to enable the people of the Illinois territory to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states," the people of said territory did, on the twenty-sixth day of August, in the present year, by a convention called for that purpose, form for themselves a constitution and state government, which constitution and state government, so formed, is republican, and in conformity to the principles of the articles of compact between the original states and the people and states in the territory north-west of the river Ohio, passed on the thirteenth day of July, one thousand seven hundred and eighty-seven: *Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the state of Illinois shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.

APPROVED, December 3, 1818.

APPENDIX B.

OPINION OF THE SUPREME COURT OF ILLINOIS, FILED SEPTEMBER 23, 1966:

Docket No. 39772 — May, 1966 Term — (Rehearing denied October 27, 1966)

LAWRENCE P. HICKEY, *et al., Appellants,* City of Chicago, a Municipal corporation, *Intervenor-Appellant,* and the People of the State of Illinois, *Intervenor-Appellant* v. Illinois Central Railroad Company, *Appellee.*

MR. JUSTICE UNDERWOOD delivered the opinion of the Court:

Shortly after dismissal of their similar suit in the Federal courts (*Hickey* v. *Illinois Central Railroad,* (7th Cir., 1960,) 278 F.2d 529, cert. den. 364 U.S. 918, 81 S.Ct. 284, 5 L.Ed.2d 259) several taxpayers filed an action in the circuit court of Cook County against the Illinois Central Railroad Company alleging that title to a quite substantial amount of largely reclaimed land on Chicago's lake front between the Chicago River on the north and 51st Street on the south was vested in the State of Illinois or, as to portions thereof, in the city of Chicago. That complaint as ultimately amended requested a finding and declaration that the interest of the defendant railroad in the lands in question is limited to an easement for use and control for railroad purposes; that ownership and title are vested in the State of Illinois in trust for the inhabitants of this State and, to the extent granted or delegated by the State or otherwise obtained by the city, in the city of Chicago; that in the event of use or disposition of the lands by the railroad for other than railroad purposes, its easement

terminates; that certain sales, leases, contracts and options granted by the railroad to portions of the questioned land and the air rights above said land for other than railroad purposes are null and void and that the railroad should be required to account to the State and city for the proceeds from such sales and be perpetually enjoined from making further sales, leases or other dispositions of the questioned property for nonrailroad purposes.

In 1962 the city of Chicago was allowed to intervene as an additional party plaintiff, and adopted the above-summarized complaint of the original plaintiffs as its own. Thereafter the defendant moved to dismiss the action, and the trial court so ordered, finding the State to be a necessary party to determination of the controversy, that the taxpayers had no standing to represent the State, and that the court could not constitutionally compel the State to intervene as plaintiff or defendant.

In the subsequent appeal to this court by the taxpayers and the city, the Attorney General filed a motion to dismiss, suggesting that plaintiff taxpayers had no standing to maintain the action. Following denial of that motion and while the case was pending upon our advisement docket, the Attorney General moved for leave to intervene. Since intervention by the State supplied the indispensable party whose prior absence constituted what then appeared to be the principal obstacle to maintenance of the suit, we remanded the cause for further proceedings. *Hickey* v. *Illinois Central Railroad Co.*, 30 Ill.2d 163, 195 N.E.2d 716.

Thereafter the Attorney General filed in the trial court an intervening complaint substantially aligning the State of Illinois with the position of the taxpayer-plaintiffs and the city of Chicago. This complaint concludes with a prayer for a declaration of the State's title to all lands east of

the 1852 Lake Michigan shoreline (roughly Michigan Avenue) between the Chicago River and Randolph Street and between 11th Place (Park Row) and Hyde Park Boulevard (51st Street) subject to the easement of the Illinois Central to such portions of these lands as are necessary to its railroad operations, requiring the railroad to account for the proceeds of its "wrongful" dispositions of such lands and air rights, that upon receipt by the State of such proceeds the rights of the grantees and lessees thereunder be confirmed, and permanently enjoining the Illinois Central from future sales, leases or other dispositions of the lands or air rights.

The railroad answered the intervening complaint, and, following a reply by the State, filed a motion for judgment on the pleadings. Its original motion to dismiss the taxpayers' and city's second amended and supplemental complaint on its merits was then undisposed of. Since it raised substantially the same points as the motion for judgment on the pleadings against the State, it was allowed to stand, and judgment was thereafter entered dismissing the taxpayers', city's and State's complaints for want of equity and declaring the defendant railroad to be the fee-simple owner of all of the lands in question between the Chicago River and Randolph Street and south of 11th Place.

The reclaimed lands involved herein are of immense value, and particularly is this so in view of the present practice of constructing large high-rise buildings over portions thereof where possible to do so without disturbing their use for railroad purposes. Rights to future development of the overlying air rights for nonrailroad purposes are determined by the fee ownership of the lands. If the State has retained the fee-simple title to the land, and the

railroad has only a right-of-way for railroad purposes, the State owns and may sell the "air rights" over the property (which would otherwise be subject to control and sale by the railroad) for any purpose compatible with continued railroad usage.

This appeal by the State, city and taxpayers from that judgment presents substantial problems in a remarkably complicated context. Their resolution has necessitated a review of the history of the Chicago lake front and the Illinois Central Railroad since 1851. In that year defendant was incorporated by an act of the General Assembly which granted it a right-of-way 200 feet wide throughout the length of the State and required the consent of any city prior to location of the railroad tracks within such city's corporate limits. In 1852 the city of Chicago adopted an ordinance consenting to construction of the railroad along the lake front from the city's southern boundary (then 22nd Street) to the Chicago River, providing for the erection of "necessary and convenient buildings, slips or apparatus", giving the railroad the right to "extend their works and fill out into the lake" in specified areas and for specified distances. In return, the railroad was required to and did erect and maintain a breakwater east of its tracks from Randolph Street to the then southern boundary of the city. (This was later extended south to 49th Street.)

Thereafter the railroad acquired by purchase or condemnation the title to the private shorelands on the 1852 shoreline between the river and Randolph Street and south of 16th Street. As to the original shorelands between the Chicago River and Randolph Street, and between 11th Place and 16th Street, the State concedes that the railroad acquired the fee. Concerning the original shorelands south

of 16th Street, the State admits that the railroad has, through the exercise of eminent domain and by virtue of various conveyances, purportedly acquired title, but does not admit that fee-simple title was actually acquired thereby. The Illinois Central's tracks, as originally constructed, were partially on land along the shore, and, particularly south of 12th Street, were supported by piling driven into the submerged lake bed. In 1864 the Illinois Central conveyed to the Michigan Central Railroad its interest in some of the filled lands east of Michigan Avenue between the river and Randolph Street, retaining some operating rights and leasehold interest therein. This property was subsequently repurchased at a substantial cost. In 1869 the General Assembly enacted a statute conveying to the Illinois Central all of the State's title to the submerged lands lying east of the tracks and breakwater of the railroad to a point one mile out in the lake between the river and approximately 1500 South. This statute also confirmed the rights of the railroad in certain land lying east of a line running parallel to and 400 feet east of the west line of Michigan Avenue between Monroe Street and 11th Place. This act was repealed in 1873, the repealing statute being held effective as to the conveyance, but not as to the confirmation, by the United States Supreme Court in the Lake Front Case hereinafter mentioned. Between 1870 and 1885 there was further filling of submerged land and building of piers by the Illinois Central.

In 1883, the *Lake Front* Case was initiated by the State of Illinois when it filed suit against the Illinois Central and the city to ascertain the rights of the respective parties in the lake front lands, both submerged and filled, and the then existing structures between the river and 16th Street. That litigation, originally brought in the circuit court of Cook County, was removed to the then United States Cir-

cuit Court for the Northern District of Illinois (*State of Illinois* v. *Illinois Central Railroad Co.* (1888), C.C., 33 F. 730). Thereafter the cause was before the United States Supreme Court (1892) (146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018), again in the United States Circuit Court, the Circuit Court of Appeals (7 Cir., 91 F. 955) and ultimately again before the Supreme Court of the United States (*People of State of Illinois ex rel. Hunt* v. *Illinois Central Railroad Co.* (1902) 184 U.S. 77, 22 S.Ct. 300, 46 L.Ed. 440). The parties hereto are agreed that those decisions are *res judicata* as to the finding that the city owned the filled lands between Randolph Street and 11th Place, subject only to a right-of-way in the railroad, and as to the previously noted effect of the 1869 and 1873 statutes. They totally disagree concerning the disposition of title to the other lands, the Illinois Central arguing that the net effect of the *Lake Front* Case was to give it a fee-simple title to the property involved, and the State now vigorously contending that the true purport of the decisions was to construe the interest of the railroad as an easement for such uses as were reasonably necessary to its corporate purposes, including the right to build and maintain piers and wharves out to the point of practical navigability, leaving the fee in the State or city subject to such easement.

By 1912 the lake shore line between 11th Place and 49th Street was composed largely of filled land occupied by the Illinois Central which also claimed fee-simple title thereto. The Park Extension Act of 1907, "An Act authorizing park commissioners to acquire and improve submerged and shorelands for park purposes, providing for the payment therefor, and granting unto such commissioners certain rights and powers and to riparian owners certain rights and titles", (Laws of 1907, p. 433,) authorized park commissioners to construct parks over submerged State

lands, and to acquire the "riparian or other rights of the owners" of shorelands adjacent to the public waters over which the improvement was to be built. The act provided the commissioners could obtain such rights from shore owners by an agreement establishing a boundary line in the lake between the proposed improvement and the lands of the shore owners, and that upon completion of such agreement the commissioners were required to file in the circuit court a petition for confirmation of such boundary line agreement. The owners of the "riparian rights and lands" were required to be made defendants, and the statute further provided if "upon a hearing, the court shall find that the rights and interests of the public have been duly conserved in and by such agreement, then the court shall confirm said agreement and establish such boundary line." Thereafter, to compensate the owners for the loss of their riparian or other rights, the act provided: "[T]he owners of said shorelands are hereby granted by the State of Illinois the title to the submerged lands lying between said boundary line when so established and the shore adjacent thereto, and they shall have the right to fill in, improve, protect, use for all lawful purposes, sell and convey said submerged lands up to the line so established, free from any adverse claim in any way arising out of any question as to where the shore line was at any time in the past, or as to the title to any existing accretions."

The South Park Commissioners desired to use submerged lands in the lake south of 11th Place for a park and boulevard connecting what is now Grant Park with Jackson Park. Since the Illinois Central then claimed ownership of the filled lands between the 1852 and 1912 shorelines and the riparian rights involved from 11th Place to 49th Street, the commissioners in 1912 entered into a comprehensive

boundary line agreement with the railroad under which the railroad received, for "the release of its said riparian rights and its interest in the part of said lands penetrating into the said public waters beyond the said boundary line", the areas between the 1912 shoreline and the off-shore boundary line so established, to "have and hold the fee simple title" thereto "and to sell and convey the same". The agreement further provided that the commissioners might thereafter construct bridges, viaducts, boulevards, and railroad-track coverings over the Illinois Central tracks and lands at certain places and under specified conditions, that the railroad would move its 12th Street Station, dedicate certain land for park and boulevard purposes, and, in general, implemented the area's developmental scheme. Thereafter the commissioners petitioned the circuit court for confirmation of the agreement making the Illinois Central, among many others, parties defendant. The petition so filed asserted the railroad to be "the owner of the lands and riparian rights * * * upon the shore of said Lake Michigan on the inner or shore side of the boundary line". The railroad's answer admitted the allegations of the petition, and the court's final decree, after finding ownership of the shorelands and riparian rights to be vested in the railroad, declared fee-simple title to the therein described lands, submerged and otherwise, west of the boundary line to be vested in the Illinois Central. The State was not, as such, a party to these proceedings, although the transcript thereof contains the following statement by the judge: "Well, furthermore, the duly authorized representatives of the State, although they did not enter formal appearance in this case, did officially come into the courtroom and said to the court that in their opinion there was no interest of the State to be conserved in this case." Several taxpayers who had intervened in the pro-

ceedings and who denied the railroad's title to some of the shorelands without alleging State ownership thereof, prosecuted a writ of error to this court. It was dismissed on the ground that the statute contained no provision authorizing review. No. 8807, April 15, 1913.

It appeared in the 1912 proceedings that the railroad had not then acquired any title to some of the shorelands between 23rd and 25th Streets. Accordingly, it was necessary for supplementary proceedings to be held when conveyances to the railroad were subsequently made. This occurred in 1913, notice thereof having been given the Attorney General pursuant to the 1912 statutory amendment hereinafter commented on, and a complete boundary line agreement under the 1912 revision of the 1907 Park Extension Act (Laws of 1912, p. 51) between the Park Commissioners and the railroad was ultimately confirmed by the circuit court.

In 1930 similar boundary line proceedings were had with reference to the land between Randolph Street and the Chicago River, the principal purpose of which was to facilitate connection of the parks under the South Park Commissioners south of the river with those of the Lincoln Park Commissioners north of the river. Prior thereto and in the 1920's the railroad had filled in the slips between the piers north of Randolph Street, action which appears to be contrary to the 1888 decree in the *Lake Front* Case enjoining the railroad against further filling of submerged lake front land, but done with the consent of the Federal government, the Department of Public Works and Buildings of the State of Illinois and the city of Chicago. During 1929, and preliminary to the boundary line proceedings, the city adopted an ordinance implementing the park-connecting purpose heretofore mentioned and provid-

ing for construction of an "Outer Drive Bridge", new boulevards connecting it to the Grant Park boulevards, and for a network of elevated streets over the area encompassed by Lake Shore Drive, Randolph Street, Beaubien Court and the Chicago River. The provisions of this ordinance were accepted and agreed upon by the Illinois Central and the South Park Commissioners, the agreement including establishment of a boundary line in the lake, and providing that fee-simple title to submerged lands 280 feet in width east of the existing shore lands and directly south of the proposed bridge be vested in the railroad. The southern end of the bridge and the viaducts connecting it to Lake Shore Drive in Grant Park were all to be built over filled lands occupied by the Illinois Central or over submerged lands conveyed to the railroad by the agreement, and not on the submerged lands acquired by the South Park Commissioners east of the boundary line. No development plan for the submerged lands granted to the commissioners was made at that time, and these lands are still under water.

Pursuant to the Park Extension Act as revised in 1912 the South Park Commissioners filed their circuit court complaint seeking confirmation of the boundary line agreement, naming the Illinois Central and others defendants and alleging ownership by the railroad of the filled shore lands adjacent to the lake and east of the Michigan Central lands previously sold by the Illinois Central to the Michigan Central and repurchased in 1951 by the Illinois Central. The 1912 revision of the Park Extension Act required "notice of pendency" of such proceeding to be "given to the Attorney General" and provided: "It shall be the duty of the Attorney General to appear in such proceeding and assert the claim of the State of Illinois, if any, as to any lands involved in such proceeding, which have

been improperly taken, made or occupied, and the court shall proceed to hear and determine such claim in said proceeding". (Laws of 1912, sec. 2, pp. 54-55.) The plaintiffs challenge the constitutionality of this statutory requirement on the ground that it waives the State's immunity to suit provided by section 26 of article IV of the Illinois constitution, S.H.A., in its command that: "The state of Illinois shall never be made defendant in any court of law or equity," and it is this question which afforded a basis for direct appeal here although jurisdiction might well have been accepted by us because of the important questions presented.

The railroad answered admitting the allegations of the complaint, and the Attorney General, having received the required notice, filed a statement disclaiming any interest on behalf of the People of the State of Illinois in the involved lands. The Illinois Central also included as part of its answer a cross bill realleging its ownership and requesting a declaration (not asked in the commissioners' complaint) that it had title to such lands. The Attorney General's disclaimer on behalf of the State stood as an answer to the cross bill, and the court, without objection, entered a decree confirming the boundary line and decreeing fee-simple title to the property east of the Michigan Central lands and west of the boundary line to be vested in the Illinois Central. This decision is urged by the railroad to be conclusive and *res judicata* as to its fee-simple interest in the lands embraced therein, and it is also argued that the decree conclusively precludes the State from claiming any interest in all reclaimed lands west of the boundary line.

The Outer Drive Bridge was subsequently built, (as was a viaduct connecting it with Lake Shore Drive at Randolph Street) over the filled and submerged lands involved in the

1930 boundary line case, and the railroad filled the rest of the submerged lands west of the boundary line. Since then the Michigan Central lands have been repurchased by the Illinois Central, at a cost of $4,500,000, and the latter has consummated sales of air rights and caisson and supporting column sites for nonrailroad uses on and over portions of the disputed lands at a gross sales figure approximating $5,500,000. In addition it is not disputed that there are outstanding unconsummated contracts, leases and options presumably aggregating many more millions of dollars.

The plaintiffs maintain that the Lake Front decisions left title to the filled lands in the State subject to the railroad's easement; that the 1912, 1913 and 1930 boundary line agreements and decrees were ineffective to transfer to the railroad title to the lands involved therein because in addition to the constitutional contention mentioned earlier, (1) such agreement could be made only with shore land owners, and the State, not the railroad, was the owner of the shore lands and riparian rights embraced in those proceedings; (2) the decrees therein cannot be *res judicata* as against the State since it was not a party to the proceedings which, in any event, were not adversary in nature; and (3) the 1930 proceedings were void because the contemplated park improvement was to be situated inside rather than outside the boundary line. It is further urged that this action is not barred by the Illinois Marketable Title Act (Laws of 1959, pp. 991, 993) since the taxpayer's suit was brought within the statutory grace period and the State's subsequent intervention after termination of the grace period was proper, and that the doctrines of *laches* and estoppel are not applicable against the State nor are they apposite here in any event since disputed factual matters are involved.

[1] The railroad predicates its claim and argument upon its interpretation of the *Lake Front* Case opinions as giving it a fee title to the lands there involved, the conclusiveness of the boundary line agreements and decrees, the Marketable Title Act limitations provisions, and its argument that it would be grossly inequitable to permit the State and city to repudiate a position which they have consistently maintained for more than 50 years. In support of the last of these the railroad alleges, without denial by the State or city, a remarkably lengthy series of official acts, statements and declarations by various officials, bodies or representatives of the State, indicating that the now disputed title to these lands was then vested in the Illinois Central. Without attempting to detail the State's position as to each, it may be said fairly that the State concedes the specific acts and statements were performed or made, but disputes the conclusions to be drawn therefrom. This, however, does not present a controverted fact, resolution of which requires the taking of evidence, but involves only the legal consequence of an admittedly performed act or concededly made statement. Since the factual bases of these allegations were before the trial court, and are admitted, they may be urged in support of the judgment on appeal even though not directly ruled on by the trial court. *In re Estate of Leichtenberg,* 7 Ill.2d 545, 549, 131 N.E.2d 487.

Among the relevant material not previously set forth appear the following noteworthy circumstances: The 1852 ordinance of the city of Chicago establishing the right of the Illinois Central to enter the city expressly provided that the railroad should have the right to fill the lake bed within specified limits not precisely ascertainable from the material before us; prior to 1883, the year in which the Lake Front Case was filed, the Illinois Central had filled a good deal of submerged land, both north of Randolph Street

and south of 41th Place, and had built numerous piers and wharves along the south bank of the Chicago River extending from the lake shoreline out into the lake within the questioned areas. Also, a station and other buildings appurtenant to railroad operations were erected, many on reclaimed lands. In his brief in the United States Supreme Court on appeal from the circuit court of appeals decree (91 F. 955) the Attorney General for the State of Illinois stated that the appeal was from "the decree of the United States Circuit Court of Appeals for the Seventh Circuit, confirming the decree of the United States Circuit Court for the Northern District of Illinois, awarding to the appellee, Illinois Central Railroad Company, a portion of the bed of Lake Michigan, * * * .

"The property in controversy is all the land lying east of [the 1869 breakwater] * * * . According to the decision of this court, when this case was here before * * * this occupation *west* of said breakwater was confirmed by the Act of the Illinois legislature of April, 1869, and the railroad thereby became the owner of the shore bounded on its seaward side by this breakwater.

"The land now involved comprises some 53 acres, of which 44 acres are land raised above the waters of Lake Michigan by the appellee railroad company filling in the bed of the lake; while 9 acres are submerged and lie within the slips * * * what was the State's is by the lower court declared to belong to the railroad." The decree appealed from was affirmed.

It is apparent that thereafter there was some lack of unanimity as to who had title to the lake front property, for the 46th General Assembly (1909) adopted a joint resolution creating the Submerged and Shoreland Legislative Investigating Committee "to make a careful and com-

plete investigation of the rights of the State of Illinois, in land lying along, in and upon Lake Michigan * * *." Its subsequent report recommended that the Attorney General take appropriate action to prosecute the claims of the State to the lake front property claimed by the Illinois Central. Apparently as a result thereof the Attorney General in 1910 filed in the Cook County superior court suit seeking a judgment declaring the State to be the owner of all of the reclaimed land east of the easterly boundary of the railroad's 200-foot right of way, and enjoining further filling of submerged lands by the railroad. The 1912 report of Attorney General Stead (Biennial Report of the Attorney General of the State of Illinois, 1912, at xxv) stated the State's position as to this litigation as follows: "Although much work has been done in connection with the investigation of this case, it has been deemed best to defer further action therein until after the adjournment of the coming session of the General Assembly, in order that, if it is deemed expedient, further legislation may be had relative to the agreement referred to [the 1912 agreement]. Furthermore, the amount of made land outside of the 200-foot strip is not large and the expense of the litigation, if proceeded with, would be heavy, and, in my judgment, ought not to be incurred, if the agreement already entered into by the Park Commissioners and the railroad company meets with the approval of the General Assembly." No further legislation was adopted nor any other General Assembly action taken, and in 1913 this suit was dismissed by the State following entry of the decrees in the 1912 and 1913 boundary line proceedings declaring fee-simple title to the lands shoreward of the boundary line to be vested in the railroad.

In 1916 a complaint was made to the secretary of the Rivers and Lakes Commission of Illinois, apparently by a private citizen, the substance of which was that the Illinois

Central "was holding a large amount of land along the lake shore [between 11th Place and 51st Street] which it does not own." Responding to an inquiry by the secretary, the Attorney General (Biennial Report and Opinions of the Attorney General of the State of Illinois, 1916, at 1004, 1006) stated: "It is my understanding that the effect of said decrees [the 1912 Boundary Line Decrees] and the purpose of the acts, which are the basis of said proceedings and said decrees, was to establish a permanent boundary line on the submerged lands between the outer waterline of the park extension, or boulevard, or driveway, and the shore: * * * and to vest in the shore owner or owners title to that portion of the submerged lands from about said Park Row to Forty-ninth Street, and lying between said permanent boundary line, so agreed upon and decreed, and the shore: * * * Unless there be some jurisdictional defect in said proceedings and decrees, it seems to me these questions now sought to be raised by this complaint, and the claims of all persons of any title or interest to or in the shorelands between said points have been finally settled and adjudicated by said decrees, and that, in view of these decrees and of section 29 of the Rivers and Lakes Act, the Commission is now without jurisdiction to entertain this complaint."

The city of Chicago, in 1919, adopted an ordinance incorporating the 1912 boundary line agreement as amended and supplemented in 1913, and the railroad was authorized by the Public Utilities Commission of this State to accept the provisions of this ordinance, make the property transfers therein contemplated and proceed with the agreed plan. While this ordinance is not before us, it seems to be conceded that its provisions required the Illinois Central to depress its tracks and electrify its operations, and that such action has been accomplished at a cost allegedly up-

wards of $60,000,000. Since this cost allegation is disputed and it is apparent that such cost would, in any event, not be wholly and perhaps not even largely attributable to the ordinance and agreement requirements as distinguished from self-interest considerations of efficient and economical railroad operations, we do not consider this a material factor.

In 1929 the city of Chicago adopted an ordinance in the form of an amendment to the 1919 lake front ordinance. We earlier in this opinion noted the park-connecting purpose of the 1929 ordinance and its provisions for streets, boulevards and viaducts in the north-of-Randolph area east of Michigan Avenue. It is of additional interest to note that this 1929 ordinance in its comprehensive plan for development of this area specifically recognized the right of the Illinois Central and the Michigan Central (which had purchased certain lands in the area from the Illinois Central and subsequently resold them to the Illinois Central) to develop their lands for other than railroad purposes and provided for the construction by the railroads, city, and park commissioners of elevated streets, alleys and viaducts. Certain conditions as to streets in this area were prescribed when 75% of the frontage thereon was to be used for other than railroad purposes, and provision was made as to the minimum clearance to be allowed between the roadway of alleys and any structures built thereover. Maximum height of such buildings was also regulated. The ordinance further provided for the institution of circuit court proceedings to confirm the boundary line as agreed upon by the two railroads, the city and the commissioners, and that upon confirmation by the court the Illinois Central should become the owner and have title to the submerged, penetrating, adjacent or other lands on the shoreward side of the boundary line and might sell and convey,

fill in or otherwise use them, and it was provided that the railroad, city and commissioners would execute and deliver deeds of conveyance in accordance therewith. We earlier noted the execution of the agreement and acceptance of the ordinance by the railroad, and this action was authorized and approved by the Illinois Commerce Commission in 1930 by an order recognizing ownership by the railroad of the lands occupied by it but specifically providing that the general permission to proceed with its ordinance obligations did not constitute permission to grant or convey easements, leases, air rights or other incumbrances and that as to the sale or lease of the air rights, specific application for authority to make each conveyance would be necessary.

The 1929 ordinance also provided that the city, the commissioners and the railroad should jointly petition the Secretary of War to change the harbor district line to coincide with the newly agreed upon boundary line, and the petition so filed represented that the lands on the shoreward side of the boundary line between Randolph Street and the Chicago River were "owned and controlled by the Illinois Central."

The city, in the 1930 boundary line proceedings, admitted the railroad's allegations of shore and riparian rights ownership, and subsequently quitclaimed to the railroad any interest it may have had in the property involved in the 1930 proceedings.

Of some significance is the fact that subsequent to the *Lake Front* Case and during the period from 1898 to the commencement of the instant litigation the city and several municipal subdivisions, including the Park Commissioners and Sanitary District, have negotiated various types of

conveyances from the Illinois Central of portions of the lands with which we are concerned. These include grants of easements, licenses, leases and deeds in fee.

Since 1950, there have been an undisclosed number of sales, leases and options by the Illinois Central of land and air rights thereover, and buildings of very substantial value have been constructed pursuant thereto on and above the lands in question. In 1951 the Illinois Central sold to the Prudential Insurance Company certain air rights over and supporting caisson sites in the property originally sold to and repurchased from the Michigan Central, and Prudential erected a 41-story office building thereon, paying the Illinois Central some $2,270,000 for the grant. Both the purchase from the Michigan Central and sale to Prudential were approved in proceedings before the Illinois Commerce Commission of which the city and Chicago Park District were given notice. The order therein entered specifically found the Illinois Central after its purchase to be the "owner in fee" of the involved real estate. In 1959 a contract of sale of lands and air rights in the 23rd Street area for hotel purposes was made with Kabak Corporation for a total consideration approximating $1,500,000, and like proceedings were had before the Commerce Commission culminating in an order finding fee-simple title in the railroad and authorizing and approving the sale, but apparently no conveyance has yet been made. In 1962 a similar sale of air rights and supporting column sites was made to Interstate Investments, Inc. at a price of $2,750,000 and a 35-story apartment building was erected thereon. The Commerce Commission also approved and authorized this sale, finding the Illinois Central to be the fee-simple owner of the land and air rights involved. Other unconsummated contracts and options have been executed involving the lands before us.

In a suit in the circuit court of Cook County (No. 60 C 8252) seeking to compel the Illinois Central to rehabilitate the retaining wall along the south side of the river, the city alleged in its sworn pleadings that the railroad "was and still is the owner of" portions of the property now disputed. In a similar 1959 suit in the United States District Court for the Northern District of Illinois, both the Attorney General of Illinois and the Corporation Counsel of Chicago were named as parties, and both were dismissed on their own motion. In its written opinion filed September 11, 1962, that court stated: "[d]uring the past fifty years all the attorneys general of Illinois, both quondam and present, have envinced a consistent attitude of disclaimer and disinterest on the part of the State of Illinois in the lands in question."

It is agreed by all parties that there have been some fifty other boundary line proceedings for undisclosed areas of the lake front in Cook County.

In addition to the foregoing, it is apparent that in the course of the various boundary line agreements, lawsuits and property exchanges the Illinois Central has permanently parted with any riparian rights and undisputed rights of access to some four and one-half miles of lake front from 11th Place to 49th Street.

We have elaborated upon the actions of the various governmental agencies and officials, not because they are, individually, of a conclusive nature, but in order to adequately demonstrate why it may fairly be said that the prevailing governmental attitude, both State and city, since near the beginning of this century has regarded the Illinois Central Railroad as the owner, in fee, of the now disputed lands. It is manifest that subsequent to the turn-of-the-century

Lake Front Case, questions existed as to the extent of the respective State and railroad interests in these lands. While the State now attacks the validity of the 1912 and 1913 boundary line proceedings, it is clear that those proceedings were then regarded as conclusively establishing title to the lands, submerged and filled, between the boundary line thus established and the 1852 shoreline, in the Illinois Central. It is equally clear that the Michigan Central, prior to its 1951 conveyance to the Illinois Central, was regarded as owning the land so conveyed, and that the Illinois Central was regarded as the owner of the reclaimed lands involved in the 1930 proceedings both prior and subsequent thereto.

[2, 3] We come then to a consideration of the vital question: If we assume to be correct the conclusions drawn by the plaintiffs as to deficiencies in the methods by which the State was divested of its original title to the off-shore lake bed, (and we do not mean to imply that they are,) is the State by its conduct prior hereto now barred from asserting its claim? If so, there is no reason for discussion of other issues. As this court has earlier observed: " * * * where a party by his statements or conduct leads another to do something he would not have done but for the statements or conduct of the other, the one guilty of the expressions or conduct will not be allowed to deny his utterances or acts to the loss or damage of the other party. The party claiming the estoppel must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts." (*Dill* v. *Widman*, 413 Ill. 448, 455-456, 109 N.E.2d 765, 769.) It is apparent that these elements are present here.

[4, 5] It is, of course, elementary that ordinary limitations statutes and principles of *laches* and estoppel do not apply to public bodies under usual circumstances, (19

Am.Jur., Estoppel, par. 166; 31 C.J.S. Estoppel § 138; 1 A.L.R.2d 338, 340) and the reluctance of courts to hold governmental bodies estopped to assert their claims is particularly apparent when the governmental unit is the State. There are sound bases for such policy. It is said that since the State cannot be sued without its consent, an inevitable consequence is that it cannot be bound by estoppel. More importantly, perhaps, is the possibility that application of *laches* or estoppel doctrines may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials. *United States* v. *State of California,* 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889; *People* v. *Brown,* 67 Ill. 435, 438.

[6] But it seems equally true that the reluctance to apply equitable principles against the State does not amount to absolute immunity of the State from *laches* and estoppel under all circumstances. The immunity is a qualified one and the qualifications are variously stated. It is sometimes said *laches* and estoppel will not be applied against the State in its governmental, public or sovereign capacity (*People, by Barrett* v. *Bradford,* 372 Ill. 63, 22 N.E.2d 691, 155 A.L.R. 427), and it cannot be estopped from the exercise of its police powers or in its power of taxation or the collection of revenue. *People* v. *Chas. Levy Circulating Co.,* 17 Ill.2d 168, 175, 161 N.E.2d 112; *People* v. *Illinois Women's Athletic Club,* 360 Ill. 577, 579-580, 196 N.E. 881; *People ex rel. Smith* v. *Woods,* 354 Ill. 224, 188 N.E. 369; *State* v. *Illinois Central Railroad Co.,* 246 Ill. 188, 92 N.E. 814.

[7-9] It has, however, been stated with frequency that the State may be estopped when acting in a proprietary,

as distinguished from its sovereign or governmental, capacity (1 A.L.R.2d 338, 346-347; *Brown* v. *Trustees of Schools,* 224 Ill. 184, 186, 79 N.E. 579; *Jordan* v. *City of Chenoa,* 166 Ill. 530, 536, 47 N.E. 191) and even, under more compelling circumstances, when acting in its governmental capacity. The rule in this State, as repeatedly announced by this court, is stated in *City of Quincy* v. *Sturhahn,* 18 Ill.2d 604, 614, 165 N.E.2d 271, 277, 81 A.L.R.2d 1425; "While situations may arise which justify invoking the doctrine of estoppel even against the State when acting in its governmental capacity, [citation] we have always adhered to the rule that mere nonaction of governmental officers is not sufficient to work an estoppel and that before the doctrine can be invoked against the State or a municipality there must have been some positive acts by the officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had previously done. [Citing cases.] In applying the doctrine of estoppel, the courts will not decide the question by mere lapse of time but by all the circumstances of the case, and will hold the public estopped or not as right or justice may require. [Citing cases.] The doctrine is invoked only to prevent fraud and injustice. [Citation]." (See also *People, by Barrett* v. *Bradford,* 372 Ill. 63, 74, 22 N.E.2d 691, 155 A.L.R. 427 (dissenting opinion); *People ex rel. Petty* v. *Thomas,* 361 Ill. 448, 456, 198 N.E. 363; *Trustees of Schools* v. *Village of Cahokia,* 357 Ill. 538, 543, 192 N.E. 565; *Webster* v. *Toulon Township High School District,* 313 Ill. 541, 547-548, 145 N.E. 118; *Melin* v. *Community Consolidated School District,* 312 Ill. 376, 384, 144 N.E. 13; *Village of Itasca* v. *Schroeder,* 182 Ill. 192, 214, 55 N.E. 50; *City of Carlinville* v. *Castle,* 177 Ill. 105, 109, 52 N.E. 383; *Board of Supervisors of Logan*

County v. *City of Lincoln*, 81 Ill. 156, 159; *Chicago, Rock Island and Pacific Railroad Co.* v. *City of Joliet*, 79 Ill. 25, 39; *Martel* v. *City of East St. Louis*, 94 Ill. 67, 69-70; *People ex rel. Village of Colfax* v. *Maxon*, 139 Ill. 306, 310, 28 N.E. 1074, 16 L.R.A. 178.) Certainly, no private party would be permitted now to challenge titles to real property concerning which he had theretofore, by both overt action and passive acquiescence encouraged and allowed others to rely on for lengthy periods of time, and the question to be answered is whether the reasons underlying the reluctance to extend doctrines of estoppel and *laches* to governmental bodies outweigh the mischief which may result from recognizing a right in the State officially disclaimed for half a century.

[10] In the context of the extraordinary circumstances here prevailing we believe basic concepts of right and justice preclude the State from now asserting any claim to the lands involved in these proceedings. For a period of more than fifty years, all governmental bodies, including numerous Attorneys General and various other agencies of the State of Illinois, together with representatives of the city of Chicago, have consistently disclaimed any interest in the lands, title to which is now asserted, and have continuously acted as if they were owned in fee by the Illinois Central. Only after this cause was pending in this court on the first appeal herein did the Attorney General seriously maintain the contrary.

Meanwhile, numerous other lake shore boundary line agreements have been consummated and confirmed, conveyances made, leases executed and options granted; proposals for lake shore development were agreed upon and accepted whereby substantial construction obligations were

apportioned as between the city, Park Commissioners and the railroad in reliance upon the assumption that the railroad was the fee owner of the lands it occupied; the railroad has permanently parted with its right of access to the lake shore throughout the major portion of the area here involved, and to permit so belated a claim to be raised now as to real estate titles regarded for many years as securely established would promote confusion and uncertainty in an area where it can be least tolerated.

The judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED

Order denying petitions for rehearing filed by petitioners, State of Illinois and City of Chicago.

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and sixty-six, within and for the State of Illinois.

Present: Ray I. Klingbiel, Chief Justice
Justice Walter V. Schaefer Justice Harry B. Hershey
Justice Byron O. House Justice Roy J. Solfisburg, Jr.
Justice Robert C. Underwood
William G. Clark, Attorney General
Robert G. Miley, Marshal
Attest: Mrs. Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 27th day of October, A.D. 1966, the same being one of the days in vacation after the Term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Lawrence P. Hickey, et al., etc., et al., *Appellants,* vs. Illinois Central Railroad Company, an Illinois corporation, *Appellee.*	Appeal from Circuit Court Cook County
No. 39772	

And now, on this day, the Court having duly considered the petitions for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petitions and denies a rehearing in this cause.

Judgment of Illinois Supreme Court

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of September in the year of our Lord, one thousand nine hundred and sixty-six, within and for the State of Illinois.

Present: Ray I. Klingbiel, Chief Justice
Justice Walter V. Schaefer Justice Harry B. Hershey
Justice Byron O. House Justice Roy J. Solfisburg, Jr.
Justice Robert C. Underwood
William G. Clark, Attorney General
Robert G. Miley, Marshal
Attest: Mrs. Earle Benjamin Searcy, Clerk

Be It Remembered, that, to-wit: on the 23rd day of September 1966, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Lawrence P. Hickey, George D. Sullivan, Jr., Burton H. Young and Thomas R. Benz, and the City of Chicago, a municipal corporation, for the benefit of the City of Chicago, by Lawrence P. Hickey, George D. Sullivan, Jr., Burton H. Young and Thomas R. Benz, Taxpayers, and the People of the State of Illinois,
Appellants,

vs.

Illinois Central Railroad Company, an Illinois corporation,
Appellee.

Appeal from Circuit Court Cook County

60 C 9761

No. 39772

Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellee recover of and from the said appellants costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 3rd day of November, 1966.

(SEAL) /s/ Mrs. Earle Benjamin Searcy
Clerk,
Supreme Court of the State of Illinois.

Trial Court Opinion

OPINION of the Trial Court, dated October 19, 1965, concluding that Defendant's Motion to Dismiss the Second Amended and Supplemental Complaint of the Original Plaintiffs, adopted by the City of Chicago, and Defendant's Motion for Judgment on the Pleadings against the Intervening Complaint of the State of Illinois should be granted, stating as follows:

This cause comes on following oral argument by Attorneys for Hickey, et al., for the City of Chicago, for the People of the State of Illinois, Plaintiffs and Intervenors, and for the Defendant. The Court has read and considered the Second Amended and Supplemental Complaint, in which the City of Chicago has joined, the Defendant's Motion to Dismiss, the State's Intervening Complaint, Defendant's Answer thereto, the State's Reply and Defendant's Motion for Judgment on the Pleadings. In addition, the Court has read and considered the various Briefs, Motions and other suggestions filed by the various parties during the proceedings before this Court and before Judge Tucker and in the appeal to the Supreme Court Of Illinois and the decision of the Supreme Court with respect thereto.

The Motion to Dismiss and the Motion for Judgment on the Pleadings, filed by the Defendant, are based on the assertion that, as a matter of law, the claims asserted by and on behalf of the City and State to the lands in controversy are barred by Decrees entered in the year 1888 and the year 1896 by the Circuit Court of the United States for the Northern District of Illinois, (in which litigation the State, the City and this Defendant Railroad Company were parties) and by Decrees entered in the years 1912, 1913 and 1930 by the Circuit Court of Cook County in statutory proceedings concerning the boundary line of the same lands involved here. Defendant also pleads the bar of the 40 year Statute Of Limitations (I.R.S. 1963, Ch. 83, Para. 12.1-12.4).

The Federal Court litigation resulting in the Decrees of 1888 and 1896 was instituted by the State for the purpose of establishing title to the land lying along the shore of Lake Michigan from the Chicago River south to Sixteenth Street; the Railroad Company and the City were both made Defendants. All of the parties before this Court agree that the issues resolved in these Decrees are *res judicata* here, but the Railroad contends that the Decrees settled title in its favor, while the Plaintiffs and Intervenors contend that it did not. The parties have agreed that any ambiguity and uncertainty concerning those proceedings must be resolved by reference to the contemporary evidence of the Court's intention.

The records and opinions in the case show that the Railroad had reclaimed the land along the shore from the shallow waters of the Lake and was using that land for wharves, piers, station grounds, roadbed for tracks and other works and structures. All of this reclaimed land is shown on the "Morehouse Map", Exhibit S-II and Exhibit I. C.-1 in the present case.

The Decree of 1888, so far as pertinent here, declares that the Railroad Company is the owner in fee of all the wharves, piers and other works and structures erected by it, as shown on the Morehouse Map, including its station grounds. This holding was prompted and was responded to by the State's effort to settle the title to the filled-in shore land occupied by the Railroad. On appeal from the Decree, the assignment of error was that the Court had erred

> "in confirming the title of the Illinois Central Railroad Company to the portion of said submerged land reclaimed by said Company".

The United States Supreme Court stated (146 U.S. at page 433) that

> "the object of the suit is to obtain a judicial determination of the *title of certain lands* * * * which had been reclaimed from the waters of the lake."

Throughout his several Briefs, the Attorney General of Illinois consistently considered and treated the Decree to be of and concerning the *fee title to the land* reclaimed from the waters of the lake.

In the light of these facts, this court holds that the 1888 Decree declared the Defendant Railroad to be the fee owner of all of the reclaimed land shown on the Morehouse Map between the Chicago River and Randolph Street, and between 12th Street and 16th Street, and described as built in 1872 and 1873, 1881, 1880, 1867, 1885 and 1870.

The United States Supreme Court affirmed this Decree as to all of the land created *prior to* 1869, but remanded the case for the sole purpose of a determination as to whether the land created *after* 1869 extended into the lake to such an extent as to interfere with navigation. Thereafter, in 1896, the same Circuit Court decreed that there was no such interference and that Decree likewise was affirmed.

This court therefore concludes that the Defendant Railroad Company is the fee owner of the land involved in this suit and that its title is not subject to attack by the Plaintiffs or the City or the State.

The "Boundary Line Decrees" of 1912 and 1913 established and confirmed a boundary line between the Railroad and the South Park Commissioners along the shore of Lake Michigan from Park Place to 49th Street, and the Decree of 1930 established and confirmed a boundary from the Chicago River to Randolph Street. These Decrees were

pursuant to statutory authority empowering park commissioners to enter into boundary line agreements with shoreland owners by which such owners would divest themselves of their riparian rights in exchange for submerged lands. The parties here concede that under such statutory authority the South Park Commissioners could enter into boundary line agreements with shoreland owners.

The parties also concede that when such agreements were approved by the Circuit Court, they had the effect in law of a legislative conveyance to the shoreland owner of the State's title to the lands that were the subject of the agreement. The statutory language in this regard provides that the shoreland owner in such a case

> "shall have the right to fill in, improve, protect, use for all lawful purposes, sell and convey said submerged lands * * * free from any adverse claim in any way arising out of any question as to where the shoreline was at any time in the past, or as to the title to any existing accretions".

It is contended in this case that the Railroad Company was not the shoreland owner and that therefore the Boundary Line Agreements, the Decrees and the statutory conveyances were not effective. This claim in turn is predicated upon the ~~fact~~ that the Railroad Company had filled in the lake along the shoreline, thus removing its natural shoreline from the shore, so that it is contended that the Railroad was no longer the shoreland owner. It is argued that in this circumstance the State, being the owner of the lake bottom upon which fill was placed to make a new shoreline, is the true owner of the shoreland.

This contention is clearly an adverse claim arising out of questions as to where, in fact, the shoreline was in the past, and involves title to the accretions. As such, the

claim is expressly barred by the applicable statutes (Laws 1907, p. 433; Laws 1912, p. 51). This court holds that the Boundary Line Agreements between the South Park Commissioners and the Illinois Central Railroad Company, the Decrees of 1912, 1913 and 1930 approving those Agreements, and the applicable statutes effectively conveyed the State's title to the land in controversy to the Railroad Company.

Finally, the Plaintiffs argue that, because the Attorney General appeared on behalf of the State in the proceedings leading up to the 1930 Decree and disavowed any interest by the State in the land there involved, the Decree violated Article 4, Section 26 of the Constitution of 1870, providing that the State shall never be made a defendant in any court of law or equity. This court holds that the Plaintiffs' argument is not well founded and that the constitutional provisions were not affected. The proceedings were statutory and designed to protect the State's interests; the State's appearance was not necessary to effectuate the legislative conveyance.

This Court therefore concludes that the Defendant's motions should be and they are granted.

Counsel for Defendant will prepare and present within ten days a Decree in accordance with this opinion, with service of a copy on all other counsel prior to its presentation to the Court.

(Signed) Walker Butler
Judge.

Dated: October 19, 1965.

Trial Court Decree

DECREE entered by the Circuit Court of Cook County on October 28, 1965, dismissing the Second Amended and Supplemental Complaint and granting Defendant's Motion for Judgment on the Pleadings against the Intervening Complaint of the State of Illinois, stating as follows:

DECREE

This cause coming on to be heard on the Second Amended and Supplemental Complaint of Lawrence P. Hickey, George D. Sullivan, Jr., Burton H. Young and Thomas R. Benz, adopted by the City of Chicago, the Intervening Complaint of the State of Illinois, Defendant's Answer to Intervening Complaint of the State of Illinois, and the State's Reply to Defendant's Answer, and on Defendant's Motion to Dismiss Plaintiffs' Second Amended and Supplemental Complaint and Defendant's Motion for Judgment on the Pleadings in its favor and against the State of Illinois;

And the Court having fully considered the pleadings and motions and the briefs and oral arguments of the parties by their counsel,

The Court finds that it has jurisdiction of all the parties to this cause and the subject matter hereof, and further finds that the proceedings and decree, pursuant to Ill. Rev. Stat. 1929, ch. 105, §§ 92-98 (Smith-Hurd), in *South Park Commissioners* v. *Illinois Central Railroad Company, et al.*, Case No. B-201982 in the Circuit Court of Cook County, Illinois, July Term, A.D. 1930, did not violate Article IV, Section 26, of the 1870 Constitution of the State of Illinois, and

It is hereby ORDERED, ADJUDGED AND DECREED that:

1. Defendant's Motion for Judgment on the Pleadings in its favor and against the State of Illinois be and it hereby is granted, and the Intervening Complaint of the State of Illinois is hereby dismissed for want of equity.

2. Defendant's Motion to Dismiss the Second Amended and Supplemental Complaint, filed by Lawrence P. Hickey, George D. Sullivan, Jr., Burton H. Young and Thomas R. Benz and adopted by the City of Chicago, be and it hereby is granted, and the Second Amended and Supplemental Complaint is hereby dismissed for want of equity.

3. Defendant Illinois Central Railroad Company is the owner in fee simple of all the lands claimed in this cause by the State of Illinois and the City of Chicago, or on their behalf, between the Chicago River and the north line of Randolph Street and south of 11th Place, or Park Row, in the City of Chicago, Cook County, Illinois.

ENTER: (Signed) Walker Butler
Judge

Dated: 10-28-65

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AUTHORITIES CITED

CASES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 945

LAWRENCE P. HICKEY, et. al.,
Petitioners,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ILLINOIS CENTRAL RAILROAD COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This was a real property action brought in the Circuit Court of Cook County. The plaintiffs were the State of Illinois, the City of Chicago and petitioners who sued as taxpayers on behalf of the State and City. The suit challenged the Illinois Central's title to certain lands located adjacent to Chicago's original lakefront. Plaintiffs sought a judgment that the State owned the fee to the lands in controversy and the air rights[1] over those lands and that respondent merely held an easement for railroad purposes.

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1. Under Illinois law (Ill. Rev. Stat. 1965, Ch. 114, § 174a) railroads may sell, lease or themselves develop air rights over land owned by them.

After extensive argument the trial court entered its final judgment decreeing that "defendant Illinois Central Railroad Company is the owner in fee simple of all the lands claimed in this cause by the State of Illinois and the City of Chicago or on their behalf." (Pet. App., p. 37) On appeal to the Supreme Court of Illinois, that Court entered its final judgment that "the judgment of the Circuit Court of Cook County aforesaid be affirmed in all things and stands in full force and effect notwithstanding the subject matter and things therein assigned for error." (Pet. App., p. 30)

In a unanimous opinion[2] the Illinois Supreme Court held that as a matter of state law the State, the City of Chicago and the taxpayer petitioners here were estopped to challenge the respondent's fee simple title.

This is the second time petitioners have sought to bring their alleged claim against the Illinois Central into this Court (cf. *Hickey, et. al.* v. *Illinois Central Railroad,* 278 F.2d 529 (7th Cir. 1960), *cert. denied,* 364 U.S. 918 (1960)). It is also the second time this term that the Court has been asked to hold that a so-called federal trust, of purely judicial origin, disables the State of Illinois from making limited conveyances of its submerged lands to private users (cf. *Droste* v. *Kerner,* et al., No. 671, Oct. Term 1966, *appeal dismissed,* .... U.S. .... (1967)).

Only the taxpayer petitioners seek certiorari. The State and the City have publicly announced that in their view no federal question is present and that no useful purpose can be served by postponing the finality of the Illinois Supreme

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2. Hickey, et. al. v. Illinois Central Railroad Company, 35 Ill. 2d 427, 220 N.E. 2d 415 (1966).

Court's judgment.[3] Since petitioners pretend to be representing the State and enforcing its claims, this decision by the State should be dispositive of every argument they now present.

QUESTION PRESENTED

After reviewing the history of the lands in controversy, the circumstances claimed to vitiate the Illinois Central's title, and a "remarkably lengthy series of official acts, statements and declarations by various officials, bodies or representatives of the State, indicating that the now disputed title to these lands was then vested in the Illinois Central,"[4] the court below observed that if that prior conduct had barred the State from asserting a claim no other question in the case need be reached. "In the context of the extraordinary circumstances here prevailing"[5] the court then concluded that the State, the City, and the petitioners on their behalf were estopped to challenge respondent's fee simple title.

Since this conclusion was based entirely on state law, the only question presented is:

> Whether a federal question is raised by a state supreme court ruling that as a matter of state law the state may be estopped from claiming title to land within its boundaries.

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3. Shortly after the Illinois Supreme Court denied a Petition for Rehearing (Pet. App., p. 28), the Attorney General of the State of Illinois and the Corporation Counsel of the City of Chicago issued an official public statement to this effect. Respondent respectfully asks that the Court take judicial notice of this statement, a true copy of which is attached as an Appendix to this brief.

4. Hickey, et. al. v. Illinois Central Railroad Company, 35 Ill. 2d 427, 439, 220 N.E. 2d 415, 421 (1966).

5. *Id.* 35 Ill. 2d at 449, 220 N.E. 2d at 427.

Petitioners now belatedly assert that this Court's opinion in the Lakefront Case, *Illinois Central R. R. v. Illinois,* 146 U.S. 387 (1892), created a "federal trust" of all Illinois lands submerged or formerly submerged by Lake Michigan. This argument, apparently borrowed from the jurisdictional statement filed with this Court in *Droste* v. *Kerner,* No. 671, Oct. Term, *appeal dismissed,* .... *U.S.* .... (1967), was neither presented to nor decided by the court below.

STATEMENT

Petitioners, four Chicago lawyers, commenced this litigation in the state courts in 1960 on behalf of the State of Illinois and City of Chicago, following dismissal of an earlier suit in the district court for lack of federal jurisdiction.[6] Subsequently, the City of Chicago intervened as a plaintiff, and still later the State of Illinois intervened and filed its own complaint after a similar suit brought by the State in the federal district court in 1962 had also been dismissed for want of jurisdiction.[7]

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6. Hickey v. Illinois Central Railroad, 278 F.2d 529 (7th Cir. 1960), cert. denied, 364 U.S. 918 (1960).

7. Illinois v. Illinois Central Railroad Company, No. 62 C 1749, Northern District of Illinois, motion to dismiss for lack of federal jurisdiction granted November 15, 1963, (unreported). Thus, two federal courts have now decided that petitioners' attack on the Illinois Central's title involves no federal question, and this Court has already denied certiorari once. It follows that elementary principles of *res judicata* alone provide a conclusive answer to the present petition. The federal district court suits involved the same alleged cause of action as the case at bar. The same title to the same land was attacked. The same claims that the Illinois Central had only an easement for railroad purposes were made. In their federal suit petitioners contended that fee title to the land was in the State of Illinois, the City of Chicago or other parties, on the theory that one or more of them owned reversionary interests. Petitioners then had the opportunity to raise each claimed federal question they now

The Complaint and Intervening Complaint asserted that lands reclaimed from Lake Michigan by the Illinois Central belonged to the State of Illinois and the City of Chicago and that the Railroad had merely an easement over such lands for railroad purposes.

In 1883 the State of Illinois had brought an action against the Illinois Central in the United States Circuit Court for the Northern District of Illinois, claiming title to land reclaimed from Lake Michigan and to an area still submerged. In that case it was ultimately adjudged and decreed, among other things, "that the Illinois Central Railroad Company is the owner in fee of all the wharves, piers and other structures erected by it ... including the station grounds." (R. 3, pp. 425-6). Those wharves, piers, structures and station grounds were the reclaimed land to which the State sought title. It now constitutes a major portion of the land in controversy.

In actions brought in 1912, 1913 and 1930 in the Circuit Court of Cook County, Illinois, by the South Park Commissioners, an agency of the State of Illinois, statutory boundary line agreements between the Park Commissioners and the Illinois Central were approved with respect to all of the property in question. (R. 3, pp. 393-94, 399-400, 523). The statutes involved provided for such agreements and

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assert. The Court of Appeals for the Seventh Circuit nevertheless held:

> "We conclude that, insofar as plaintiffs sue on behalf of the people of the State and City, the case is not within the judisdiction of the federal courts." 278 F.2d at 532.

This Court denied certiorari, and the Seventh Circuit's ruling thereupon became a final adjudication that the claims made in the courts below present no federal questions. There is "no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation." Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

Circuit Court approval thereof (Laws of Illinois, 1907, p. 433; Laws of Illinois, 1912, p. 51) for the purpose of eliminating riparian rights along the Lake Michigan shore so that public parks and boulevards could be built on land reclaimed from the lakebed (R. 3, pp. 392-93, 395-96, 523). To compensate the shoreland owners for the loss of their riparian rights (R. 3, pp. 199, 346) the statutes provided that upon Circuit Court approval of a boundary line agreement:

> "the owners of said shore lands are hereby granted by the State of Illinois the title to the . . . submerged, . . . lands, . . . up to the line so established, free from any adverse claim in any way arising out of any question as to where the shoreline was at any time in the past or as to the title to any existing accretions." (Laws of Illinois, 1907, p. 435; Laws of Illinois, 1912, p. 54; R. 3, pp. 393, 396, 523).[8]

As the court below observed, it was alleged in considerable detail by the Illinois Central, and not denied, that the State of Illinois and the City of Chicago had by a series of official acts repeatedly and over a long period of time acknowledged the fee title of the Illinois Central to the lands in dispute (R. 3, pp. 401-17, 525). This official conduct commenced after the first Lakefront decision in 1892 and continued during the boundary line proceedings and up to 1962.

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8. As the court below noted (Pet. App. 22; 35 Ill. 2d at 446, 220 N.E. 2d at 425), some fifty other boundary line proceedings have been concluded under this statute settling the boundaries and titles to many separate parcels of former shoreland. The lakebed east of those lands is now filled in and occupied by Chicago's extensive lakefront park system, made possible through the surrender of riparian rights pursuant to such boundary line proceedings.

ARGUMENT

I.

The Illinois Supreme Court Holding That The State Was Estopped To Claim The Title To Illinois Land Does Not Present a Federal Question.

Asserting that the courts below defied the decree of a federal court, the petitioners claim that federal questions are raised under the supremacy clause and Article III of the Constitution. But the lower courts did not do any such thing. It was recognized (Pet. App., p. 8; 35 Ill. 2d at 433; 220 N.E. 2d at 418) that the Lakefront decrees were *res judicata*. The trial court rejected petitioners' interpretation of these decrees, however, and the Illinois Supreme Court, while not disagreeing with the trial court, held that it was unnecessary to resolve the dispute over how the decrees should be interpreted.

The Illinois Supreme Court said:

> "If we assume to be correct the conclusions drawn by the plaintiffs as to deficiencies in the methods by which the State was divested of its original title to the offshore lake bed, (and we do not mean to imply that they are,) is the State by its conduct prior hereto now barred from asserting its claim? If so, there is no reason for discussion of other issues." (Pet. App., p. 23; 35 Ill. 2d at 447; 220 N.E. 2d at 425).

That court then concluded that as a matter of Illinois law:

> "In the context of the extraordinary circumstances here prevailing we believe basic concepts of right and justice preclude the State from now asserting any claim to the lands involved in these proceedings. For a period of more than fifty years, all governmental bodies, including numerous Attorneys General and various other agencies of the State of Illinois, together with representatives of the city of Chicago, have con-

sistently disclaimed any interest in the lands, title to which is now asserted, and have continuously acted as if they were owned in fee by the Illinois Central. Only after this cause was pending in this court on the first appeal herein did the Attorney General seriously maintain the contrary." (Pet. App., p. 26; 35 Ill. 2d at 449; 220 N.E. 2d at 427.)

Thus, the case "in effect was disposed of before the federal question said to be involved was reached . . . A decision of that question then became unnecessary." *Fox Film Corp.* v. *Muller,* 296 U.S. 207, 211 (1935). Events subsequent to the Lakefront case have rendered petitioners' dubious interpretation of its result irrelevant. "[T]his Court does not sit to decide arguments after events have put them to rest." *Doremus* v. *Board of Education,* 342 U.S. 429, 433 (1952).

Clearly, the Illinois Supreme Court's state law grounds were broad enough to support its decision. As that court observed, there was "a remarkably lengthy series of official acts, statements and declarations . . . indicating that the now disputed title to the lands was then vested in the Illinois Central" (Pet. App. 15; 35 Ill. 2d at 439, 220 N.E. 2d at 421). As in *Donohue* v. *Vosper,* 243 U.S. 59, 66 (1917), the litigation below "was essentially a local question, involving an appreciation of the evidence as to the conduct of the parties, and we cannot review it." It is equally clear here that the Illinois Supreme Court must be the final authority on mere issues of title to real estate in Illinois.

Petitioners' only response is two inapposite quotations from *U.S.* v. *California,* 332 U.S. 19 (1947). But *U.S.* v. *California* decided that actions of federal officials had not estopped the federal government, as against a state, from claiming title to land submerged beneath the ocean, a controversy within the original jurisdiction of this Court.

Resolution of that purely federal issue was never intended to create a doctrine binding on state courts dealing with their own states and lands.

On the contrary, decisions of this Court have consistently held that in state court litigation doctrines of estoppel, whether applied against a state or a private person, present questions of state law alone. In *Michigan* v. *Flint & Pere Marquette R.R. Co.*, 152 U.S. 363, 368 (1894), the Court granted a motion to dismiss the state's writ of error saying:

> "The Supreme Court of Michigan held . . . that the claim of the State had no foundation in equity, justice, or good conscience; that it had become stale; and that the State was estopped to assert title in itself to the lands in question. As its judgment thus rested upon the decision of a question which was not Federal, this court has no jurisdiction to review it, and the writ of error must be dismissed."

Even when one of the parties invokes a federal judgment, the question whether he is estopped to rely on it is nonetheless "not a Federal question. Whether it was sound or not, it is not for . . . [this Court] to inquire. It was broad enough to support the judgment without reference to any Federal question." *Leonard* v. *Vicksburg &c. R. R. Co.*, 198 U.S. 416, 423 (1905). Accord, *Wood* v. *Chesborough*, 228 U.S. 672 (1913); *Hale* v. *Lewis*, 181 U.S. 473 (1901). Consequently, the Illinois Supreme Court's decision neither reaches nor raises a federal question.

II.

Petitioners' So-Called "Federal Trust" Is A Creature of State Not Federal Law.

In an effort to sidestep the decision below, petitioners assert that the lands in controversy are held in the grip of a trust which they label federal. But repetitious character-

ization cannot create a federal question. Their asserted but hitherto unrecognized federal interest in state-owned submerged lands can not be supported. It was not even presented to the courts below.[9]

While suggesting that their "trust" had its source in the Congressional resolution admitting Illinois to the Union and prescribing its boundaries,[10] petitioners principally argue that the so-called "federal trust" was of judicial origin having its basis in *Illinois Central R.R.* v. *Illinois*, 146 U.S. 387 (1892).

Contrary to petitioners' reptitious assertions, however, the Lakefront Case clearly treated the public trust doctrine as a matter of state law. The case came to the federal courts

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9. Not a hint of any so-called "federal trust" argument appeared in this case before the petition for certiorari was filed. Actually, in the courts below petitioners took the position that Illinois not federal law controlled titles to submerged land. Paragraph 18 of their complaint asserted that in Illinois Central Railroad Company v. City of Chicago, 176 U.S. 646 (1900), "the Supreme Court of the United States reaffirmed its prior decision in 146 U.S. 387, referred to above in paragraph 17 hereof, and declared the local law of Illinois, which vests title to all reclaimed lands in the State of Illinois, to be conclusive on the question of the rights of the parties with respect to the ownership of lands reclaimed and filled in from the waters of the bed of Lake Michigan." (R. 3, p. 193) In paragraph 19 of the complaint they asserted this determination was *res judicata* "upon the foregoing issues," (R. 3, p. 194) and in paragraph 20 asserted that only the Illinois Legislature could convey title to reclaimed lands (R. 3, p. 195). Thus, as this Court has said many times before: "This question was not raised below. It emerged after the jurisdictional statement was filed here . . . Since the . . . [court below] did not pass on the question, we may not do so." State Farm Insurance Co. v. Duel, 324 U.S. 154, 160 (1945).

10. The most cursory reading of this resolution (Pet. App. 1-2) shows that, contrary to the assertion on page 18 of the petition, it granted no lands whatsoever to Illinois, let alone all "the federal lands within such boundaries," and nowhere declares any trust.

solely because of a claim that the State had impaired the obligation of a contract by repealing a grant to the Illinois Central of Chicago's entire inner and outer harbor and the adjacent submerged land for one mile out into the lake. The courts of Illinois had not at that time ruled on any of the issues involved.

This Court's opinion on the first appeal (146 U.S. 387) attributed the public trust doctrine it discussed to common-law, not federal constitutional or statutory sources. The opinion announced that:

> "the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea." (146 U.S. at 437)

and elaborated:

> "It is a title held in trust for the people of the State that they may enjoy the navigation of the waters. . . . It is . . . grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor." (146 U.S. at 452-53)

The Court therefore held that the grant to the Illinois Central was not irrepealable and the Illinois Legislature had not thereby surrendered its "sovereignty and dominion . . . or its ownership" of the "submerged lands in Lake Michigan." Consequently, insofar as the grant affected the submerged lands in and adjacent to the harbor its repeal

did not violate the contract clause of the Federal Constitution. (146 U.S. at 459-60) But this was far from saying that states hold title to their submerged lands subject to a trust forever binding on reclaimed land as a matter of federal law.

On the contrary, the Lakefront case did not hold the grant to the Illinois Central repealable as to any of the then filled lakebed. Based on this grant and the law of riparian rights, the decrees approved and the opinion affirmed the Illinois Central's title to and reclamation of "a crucial portion" (Pet. 6) of the lands involved in this case. In addition, title to the balance of the filled land (Grant Park) was held to be in the City of Chicago by virtue of its riparian right as owner of the adjacent shore.

Moreover, this Court's opinion expressly and repeatedly acknowledged the state's power to make limited dispositions of submerged land such as Illinois has done on Chicago's lakefront. The opinion stated:

> "It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled." (146 U.S. at 453)

This distinction was reiterated three times in the language petitioners chose to quote at page 16 of the petition, although unrecognized in their argument and deprived of the benefit of typographic emphasis given to other passages in the quotation.

Nor do the decrees in the Lakefront Case, on which petitioners inaccurately rely (e.g., Pet. 3, 4, and 9), in any way suggest the creation of a trust, federal or otherwise. The decrees, in fact, find a "trust" only in the case of the City

of Chicago's title to what is now Grant Park, an area not involved in the case at bar.

Although overlooked in the petition, decisions of this Court both before and after the Lakefront case confirm that petitioners' "federal trust" is an innovation without support in any body of federal law. Public and private titles and rights in submerged lands have always been questions upon which "the provisions of the constitution and statutes of the State and the decisions of its highest court are accepted by . . . [this court] as conclusive." *Port of Seattle* v. *Oregon & Washington Railroad,* 255 U.S. 56, 63 (1921).

In fact, between the first and the second Lakefront appeals this court confirmed the state's authority over her own submerged lands in litigation brought by the City of Chicago in a state court to restrain the Illinois Central Railroad from filling in a certain part of the bed of Lake Michigan. In its opinion the Court observed that title to submerged land was controlled by "the law of the State of Illinois, as laid down by the Supreme Court, not only in the case under consideration, but in the prior case of *People* v. *Kirk,* 162 Illinois, 138 [45 N.E. 830 (1896)]." The same opinion in the same paragraph announced that the public trust doctrine, which petitioners now seek to project into a federal constitutional limitation, "is a question of local law with regard to which the decisions of the state courts are conclusive." *Illinois Central Railroad* v. *Chicago,* 176 U.S. 646, 659 (1900). Accord, *Norton* v. *Whiteside,* 239 U.S. 144 (1915); *Whitaker* v. *McBride,* 197 U.S. 510 (1905); *Shively* v. *Bowlby,* 152 U.S. 1, (1894); *Hardin* v. *Jordan,* 140 U.S. 371 (1891); *Packer* v. *Bird,* 137 U.S. 661 (1891).

The decision below thus poses no federal question.

CONCLUSION

The only one of petitioners' supposed federal questions that was presented to the court below, construction of the Lakefront decrees, has plainly been put to rest by the adequate state ground for the Illinois Supreme Court decision. Petitioners have wholly failed to raise any other federal question. In any event, petitioners seek to review issues so plainly local in their importance and application as to be insubstantial. Accordingly, certiorari should be denied.

Respectfully submitted

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February 6, 1967

News From

WILLIAM G. CLARK

ATTORNEY GENERAL

STATE OF ILLINOIS

For inquiries, call Bill Schaub, FInancial 6-2000, Ext. 2135
FOR IMMEDIATE RELEASE

Chicago, Illinois, October 28, 1966. - State of Illinois Attorney General William G. Clark and City of Chicago Corporation Counsel Raymond F. Simon jointly announced today that there will be no further appeals taken by the State of Illinois or the City of Chicago in the long deliberated Illinois Central air rights case.

"The Illinois Supreme Court has denied our Petition for Rehearing in the Illinois Central air rights case. In reviewing the opinion of the court which was issued on September 23, 1966, and in the preparation of the Petition for Rehearing, extensive consideration was also given to the issue of whether Federal legal questions are involved in this case. We have concluded that no Federal question is present.

"The rules of the United States Supreme Court provide for ninety days in which an appeal can be filed before the court but since, in our opinion, no Federal question is present, we have concluded that no useful purpose would be served by filing a further appeal in this case.

"From the standpoint of the State of Illinois and the City of Chicago, this important litigation is now concluded.

"We are hopeful that plans for development of this property, which is of great significance to both the City of Chicago, the State of Illinois and all of our citizens, will now go forward."

Office-Supreme Court, U.S.
FILED
FEB 9 1967
JOHN F. DAVIS, CLERK

No. 945

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1966

LAWRENCE P. HICKEY, ET AL., *Petitioners,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' RESPONSE TO OPPOSITION

I

This is a suit to enforce a judgment rendered against Respondent by this Court in the *Lake Front Cases,* 146 U.S. 387, 184 U.S. 77, vesting title in the State of Illinois to a crucial portion of the lands in question.

Respondent concedes that the decree is *res judicata* but attempts to elude the *res judicata* effect by arguing in its Opposition, Point I, pp. 7-9, as if this Court's judgment was non-existent. Cases cited by Respondent, Point I of its argument, have no relevancy to the instant case because they did not involve a *res judicata* federal judgment or its enforcement. By the extraction of quotations out of context from these irrelevant authorities, Respondent has attempted to justify the judgment of the Illinois Supreme Court upon state grounds.

The alleged state grounds, *i.e.,* laches and estoppel, are untenable because Respondent was a party to the decree sought to be enforced in this case. Respondent does not even attempt to answer this fundamental legal conclusion. (Petition pp. 20, 21)

The fact is that this Court held in the *Lake Front Cases* that the title to these immensely important lands is held by the State of Illinois in trust for the people under a special type of trust which places these lands in a different category from all other lands owned by the State. The lands under the trust cannot be lost by the people except for a public purpose even by an Act of the Illinois Legislature, as held by this Court in the *Lake Front Cases.* The fact also is that the net effect of the decision of the Court below is to make a gift of these lands and air rights to the Respondent,

a private company, and thus deprive the people of property worth hundreds of millions of dollars.

The Railroad has never received a specific grant from the State of Illinois of this property; nor has it obtained in any way, other than the decision of the Court below, the title thereto.[1] It is absolutely clear, therefore, that the judgment of the Court below constitutes a nullification and utter disregard of the federal decree twice affirmed by this Court in the *Lake Front Cases.*

Respondent claims, without even citing one relevant authority in support of its position, that this Court is precluded from exercising its constitutional judicial powers under Article III, Sections 1 and 2 and Article VI (Supremacy Clause) of the United States Constitution because of state law grounds. This contention is so at variance with the facts and realities of this case that it is without merit. We respectfully submit that the enforcement of the *Lake Front Judgment* presents a federal question.

II

A portion of the lands in question was not expressly encompassed by the decree in the *Lake Front Cases.* Nevertheless said decree is *res judicata* upon these lands also because the decree expressly permanently enjoined Respondent from filling in any more of Lake Michigan. This Court's Opinion in the *Lake Front Cases* plainly held that the State of Illinois owned all of the submerged lands off its shores in trust for the people. But even if the *Lake Front Cases* were not *res judicata* with reference to this particular

---

[1] *Droste* v. *Kerner* et al., No. 671, This Term, appeal dismissed, relied upon by Respondent (Opposition p. 2) is irrelevant here as no *res judicata* federal decree was involved in *Droste,* and the Respondent in *Droste,* unlike the Respondent herein, had a specific grant by an Act of the Illinois Legislature selling submerged lands for a valuable consideration. Moreover, the purpose of the legislative grant was to enable that Respondent to build a steel manufacturing plant which was in the public interest.

portion of the lands in question, the state's title to these lands, acknowledged in the *Lake Front Cases,* cannot be destroyed by the judgment of the Court below holding that the state is prohibited by laches and estoppel from asserting its title thereto.

By so holding the Court below acted in repugnance to the federal trust impressed by this Court in the *Lake Front Cases* upon the state's title to submerged lands. The trust is a federal right which prevents any state court from avoiding a review of its judgment by this Court. Where a federal right is involved it is within the province of this Court "to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair suport." *Ancient Egyptian Arabic Order N. M.S.* v. *Michaux,* 279 U.S. 732, 745.

State law determines the ownership of submerged land, provided the trust is not violated. However, it is within the province of the United States to make certain that the states do nothing with their titles to submerged lands in conflict with the trust.[2] This conclusion arises both from the *Lake Front Cases* and the *Submerged Lands Act* (43 U.S.C sections 1301 *et seq.*).

Respondent contends that because the trust of submerged lands in the Great Lakes was known to common law it can not be a federal trust. As this Court recognized in the *Lake Front Cases,* 146 U.S. at 436, the Crown alone could exercise such dominion over navigable waters as would insure freedom in their use so far as consistent with the public interest. In this country the United States replaces the Crown with respect to the control of navigable waters. The

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[2] This Court on January 10, 1967 affirmed the continuing interest of the United States in lands held by a state in trust for the people. *Lassen* v. *Arizona Highway Dept.,* 35 Law Week 4130.

trust doctrine being founded upon the necessity of preserving the use of navigable waters to all the people from private encroachment (Ibid), it is evident that the trust is a federal trust. The states own this submerged land subject to their use and disposition in accordance with said trust.

An analysis of the first *Lake Front Opinion* demonstrates the correctness of this conclusion. In that case, this Court held in essence that even the Illinois Legislature could not surrender its "sovereignty and dominion . . . or its ownership" of the "submerged lands in Lake Michigan" by giving the submerged lands of the state to Respondent as a gift adverse to the public interest (which in the instant case would be the result unless this Court reverses the judgment below). 146 U.S. at 459-60. This Court could have so held only if the trust which prohibited the Illinois Legislature from granting title adverse to the public interest was paramount to that of the state law of Illinois.

This same federal trust is implicit in the *Submerged Lands Act*, enacted by Congress in 1953. (43 U.S.C. sec. 1301 *et seq.*). Although said Act vests title to the submerged lands under the Great Lakes in the states bordering the Lakes, significantly it provides that nothing in the Act shall ". . . be construed as a release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation . . . ." 43 U.S.C. sec. 1311(d). Thus the Act itself perpetuates the sovereign powers of the United States in regulating navigable waters for the best interest of the people, the foundation of the trust doctrine.

Congress was fully aware of the *Lake Front Cases* enforcing this trust when it adopted the *Submerged Lands Act* (1953 U.S. Code, Congressional and Administrative News, Vol. 2, pp. 1428, 1518, 1530). Under well settled law, the trust doctrine was thus incorporated into this federal law, and state law cannot interfere therewith. *T.I.M.E.* v.

United States, 359 U.S. 464, 473-474; *United States* v. *Minker,* 350 U.S. 179, 188.

This conclusion is further strengthened by paragraph (a) of 43 U.S.C. sec. 1311 wherein subparagraph (1) pertaining to the States' ownership of submerged lands is not made subject to state law as is subparagraph (2) which refers to non-ownership.

The cases relied upon by the Respondent to the effect that state law governs the disposition of state owned lands are not in point. Those cases involve state owned lands not subject to the federal trust impressd upon submerged lands. This Court recognized the distinction between ordinary state owned lands and submerged lands owned by the state under this trust. 146 U.S. at 452.

Accordingly, even with respect to that portion of the lands in question not covered by the *res judicata* effects of the *Lake Front decree,* the Petitioners are seeking the vindication of federal rights which pose a federal question.

Conclusion

It is incredible that the Court below should have awarded the railroad the title to the immensely valuable lands and air rights involved herein, solely on the ground that state officials whose duty it was to protect the state's title failed to do so. Such action is indeed a reward to private interests for the dereliction of public duty. It is equally incredible that the Respondent should attempt to defend its untenable position on the ground that the Attorney General of the State of Illinois believes that no federal question exists. (Opposition 2, 3) His intervening complaint failed to raise the federal constitutional questions contained in Petitioners' complaint. (Petition p. 11) Only this Court can decide whether a federal question exists, and the opinion of the State Attorney General is irrelevant.

Petitioners instituted this suit more than six years ago and have borne the brunt of the litigation. The Illinois Supreme Court on two appeals in the case has recognized Petitioners' vested right to bring this litigation to enforce the title of the state held in trust for the people. The Petitioners indeed have done everything conceivable in the legal prosecution of the public interest.

Only this Court has the power to protect the people. This is the peoples last chance.

For the reasons mentioned, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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39 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for the Petitioners.

(705-4)

No. 945

MAR 16 1967

JOHN F. DAVIS, CLERK

IN THE

...me Court of the United States

OCTOBER TERM, 1966

...NCE P. HICKEY, GEORGE D. SULLIVAN, JR., ...TON H. YOUNG, and THOMAS R. BENZ,
Petitioners,

vs.

...INOIS CENTRAL RAILROAD COMPANY,
an Illinois corporation,
Respondent.

PETITION FOR REHEARING OF THE DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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McCORNICK AND HENDERSON, INC., CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 945

LAWRENCE P. HICKEY, GEORGE D. SULLIVAN, JR., BURTON H. YOUNG, and THOMAS R. BENZ,
Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
an Illinois corporation,
Respondent.

PETITION FOR REHEARING OF THE DENIAL OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Your petitioners urge that because of the pendency before this Court of the cause entitled *Stella Hughes* v. *State of Washington,* October term, 1966, No. 339, *certiorari recently granted,* a rehearing should be granted, or in the alternative, that this Court defer ruling upon the instant petition until after its decision in the *Hughes* case.

The principal issue in the *Hughes* case is fundamentally identical to that in the instant case. This conclusion is demonstrated by considering point 3 of the Respondent's (State of Washington) "Reply to Memorandum for the United States as Amicus Curiae." Point 3 (pp. 8, 9 of said

Reply) is directed at the key issue raised by the Solicitor General of the United States, and succinctly states this issue:

> "When Washington was admitted to the Union as a state it became owner of all tidelands within its boundaries. Its ownership was not by grant or conveyance from the federal government but arose entirely as an incident of state sovereignty. *Pollard* v. *Hagan*, 3 How. 212, 230 (1845). We see nothing in this fact to sustain the government's argument, *Memorandum*, pp. 7, 9, that the state is *therefore powerless to modify the common law* moving boundary rule as to these tidelands." (Emphasis added)

The government's argument that the State of Washington is powerless to modify the common law moving boundary rule as to these tidelands is based upon the fact that under *Pollard* the State of Washington's rights were established at the time it became a part of the Union, subject to the common law as it existed prior thereto. As stated by the government in its Amicus Curiae Memorandum, page 9, "The common law rule governing the sovereign's ownership of the tideland (see *supra*, p. 7) as absorbed by the original States and reaffirmed by this Court, has of necessity, therefore, become the constitutional yardstick of the title obtained by all the subsequent States."

Illinois was admitted to the Union as a state on the same basis as Washington. Illinois became the owner of all submerged lands in Lake Michigan within its boundaries upon its admission to the Union. Its ownership of these submerged lands was not by grant or conveyance from the Federal government but arose entirely as an incident of state sovereignty under the doctrine of *Pollard* v. *Hagan*, 3 How. 212 (1845). This Court so held in *Illinois Central Railroad Co.* v. *Illinois*, 146 U.S. 387 (hereinafter referred

to as the "Lake Front Case") and in doing so expressly relied upon *Pollard.* See 146 U.S. at page 435.

Accordingly, at the time Illinois obtained the ownership of these submerged lands, it did so on an equal footing basis with the original thirteen states under the doctrine of *Pollard.* The common law existing even prior to the creation of the original thirteen states, as "absorbed" by these states and reaffirmed by this Court in the *Lake Front Case,* 146 U.S. at 436, 437, 453, impressed a trust in favor of the People upon the submerged lands in the Ocean which prevented the Sovereign from doing anything which would cause the submerged lands to be lost to the People, except in the public interest. This common law trust was impregnated upon the title of all the original thirteen states and, under *Pollard,* equally impregnated the title of the State of Illinois; just as in the case of *Hughes,* the rights of the State of Washington in tidelands were fixed by the common law then in existence when the State was created pursuant to the *Pollard* doctrine, as argued by the Government's Memorandum in the *Hughes* case.*.

If this Court should decide the *Hughes* case in the manner contended for by the Solicitor General of the United States, the State of Washington would be powerless to modify the

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* The national importance of the question is highlighted again by the Solicitor General at page 4 of his Memorandum:

> "Nor is there any apparent reason why, in Washington or elsewhere, the principle should be limited to tidelands; it could be applied with consistency of logic to the shifting banks of rivers and lakes owned by a State."

Compare also *Illinois Central Railroad Co.* v. *People of the State of Illinois,* 146 U.S. 387 at 435-36:

> ". . . [T]here is no reason or principle for the assertion of dominion and sovereignty over an ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

common law pertaining to these tidelands. In such an event, it would be clear that the State of Illinois, and its Courts, likewise would be powerless, as the Court below did in the instant case, to modify under State law the aforesaid common law trust imposed by this Court in the *Lake Front Case,* 146 U.S. 387, upon the State's title to its submerged lands in Lake Michigan. Obviously, laches and estoppel arising out of malfeasance or misfeasance of State officials cannot, consistent with the common law trust, cause the State to lose title to its submerged lands. *Cf. United States* v. *California,* 332 U.S. 19, 17, 20, 21.

The Illinois Supreme Court in the instant case has refused to decide whether, as petitioners contend, the *Lake Front Case,* 146 U.S. 387, vested title to the lands in question in the State. It refused to do so on the theory that the State was barred by laches and estoppel from asserting this title because State officials failed to assert the State's title to the lands in question in spite of the fact that it was their fiduciary and constitutional duty to protect the State's title. Such action by the Illinois Supreme Court is repugnant to the common law trust recognized by this Court in the *Lake Front Case. As we have observed above, such trust is binding upon the State Court because the State took the title to the submerged lands under Pollard subject to such trust when the State was created.*

The net effect of the Illinois Supreme Court decision in the instant case is to follow the argument of the State of Washington and thereby to modify the common law trust doctrine concerning submerged lands of all of the Great Lakes.

We respectfully emphasize that involved in the instant case is not merely the title to miles of critically important

lakefront lands in the City of Chicago worth perhaps half a billion dollars. The Great Lakes contain several thousand miles of shoreline, adjacent to which live approximately one-third of the population of the United States. All of these States took the title to their submerged lands in the Great Lakes under the doctrine of the *Pollard* case. If the decision of this Court in the *Hughes* case follows the contention of the Solicitor General of the United States, all of these Great Lakes States will be affected.* Moreover, the same decision will affect all of the navigable waters in the interior of the United States, such as navigable rivers and Lakes other than the Great Lakes.**

If *Hughes* is decided favorable to the government's position in that case, and a similar decision is not reached in the instant case, a serious void and doubt will exist in the important field of federal-state confrontations.

Because of the important common issue involved in both the instant case and *Hughes*, it would appear desirable and

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* A current problem of national interest is the allowing of private interests in the State of Indiana (commonly known as "Burns Ditch") to fill and extend the shorelands of Indiana into Lake Michigan and the militant objections thereto by civic groups. It appears that one or the other party will proceed to this court with virtually the same question.

** "The past twenty years have seen a surge of interest in boundaries of sea and land, in 'tidelands' or 'submerged' lands. The boundary question became an early example of recent federal-state confrontation in the Supreme Court; the advances in technique and equipment to mine in the seas and fill flats coincided with shortage of land, the needs of industry for waterfront sites, the increase in value of beaches and shores for residence and recreation, and collision with conservation interests." American Bar Association Journal, Volume 53 at page 272 (March 1967).

appropriate to defer a decision on this Petition for Rehearing until after this Court's decision in the *Hughes* case.

Respectfully submitted,

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Of Counsel:

EDWARD J. CALIHAN, JR.
ANNA R. LAVIN
GEORGE D. SULLIVAN, JR.

CERTIFICATE PURSUANT TO RULE 33 OF THE RULES OF THIS COURT

I do hereby certify, as an attorney in good standing before this Court, that the above stated Petition for Rehearing contains substantial grounds amenable to this Court's jurisdiction not previously presented; and that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the substantial grounds described as aforesaid.

.....

LEONARD R. HARTENFELD
Attorney for Petitioners